Supreme Court, U. S.
FILED
JUL 16 1975
MICHAEL RODAK, JR., CLERK

In The

# Supreme Court of the United States

October Term, 1975

No. 75-98

JOHN DOE NO. 1,

*Petitioner,*

*vs.*

BANCO FRANCES E BRASILIERO,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

MARTIN E. SILFEN
*Attorney for Petitioner*
545 Fifth Avenue
New York, New York 10022
(212) 986-0890

WARNER & GILLERS, P.C.
STEPHEN GILLERS
MARTIN E. SILFEN
*Of Counsel*

(8509) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

South River, N.J. (201) 257-6850 | New York, N.Y. (212) 563-2121 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (201) 783-7288

## TABLE OF CONTENTS


*Page*

Opinions Below ..... 1

Jurisdiction ..... 2

Questions Presented ..... 2

Constitutional and Statutory Provisions Involved ..... 2

Statement of the Case ..... 5

Reasons for Granting the Writ ..... 8

(a) The state high court decision is "law" for purposes of the Supremacy Clause. ..... 9

(b) The state court decision conflicts with or is pre-empted by the Bretton Woods Agreement Act. .. 9

(c) The well-established federal common law rule prohibits enforcement of foreign national currency control laws. ..... 15

(d) A common law rule can be "conflicting federal law" for purposes of the Supremacy Clause. ..... 16

(e) The state ruling is inconsistent with Congress' power to regulate foreign commerce and the President's power to regulate foreign affairs. ..... 17

Conclusion ..... 20

## TABLE OF CITATIONS

*Page*

**Cases Cited:**


Banco do Brasil v. A.C. Israel Commodity Co., 12 N.Y.2d 371, 239 N.Y.S.2d 872 (1963) ..... 16

California Bankers' Assoc. v. Schultz, 416 U.S. 21 (1974) ... 18

Campbell v. Hussey, 368 U.S. 297 (1961) ..... 12

Chy Lung v. Freeman, 92 U.S. 275 (1875) ..... 18

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) ..... 12

Gibbons v. Ogden, 9 Wheat. 1 (1824) ..... 18

Hall v. DeCuir, 95 U.S. 485 (1877) ..... 16

Henderson v. Mayor of New York, 92 U.S. 259 (1875) ..... 17

Holman v. Johnson, 98 E.R. 1120 (1775) ..... 15

Huntington v. Attrell, 146 U.S. 657 (1892) ..... 15

Interstate Commerce Commission v. B & O Railroad, 145 U.S. 263 (1892) ..... 17

Kolovrat v. Oregon, 366 U.S. 187 (1961) ..... 13




*Contents*

*Page*


Missouri v. Holland, 252 U.S. 416 (1920) .....11, 18

Moore v. Mitchell, 30 F.2d 600 (2nd Cir.) .....15, 19

Morgan v. Commonwealth of Virginia, 328 U.S. 373 (1946) ..... 9

Perez v. Brownell, 356 U.S. 44 (1958) ..... 19

Perez v. Campbell, 402 U.S. 637 (1971) ..... 12

Plance v. Fletcher, 1 Doug K. B. 251 (1779) ..... 15

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) ..... 12

Rossano v. Manufacturing Ins. Co., 2 All. E. R. 214 (1962) . 15

Southern Pacific Co. v. State of Arizona, 325 U.S. 761 (1945) ..... 17, 18, 19

The Antelope, 23 U.S. 66 (1825) ..... 15

United States v. Belmont, 301 U.S. 324 (1937) ..... 9

United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) ..... 19

Western Tel. Co. v. Cal. Pub. Co., 181 U.S. 92 (1901) ..... 17

*Contents*

*Page*

Whiteside v. Southern Bus Lines, 177 F.2d 949 (6th Cir. 1949) ..... 9

Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888) ..... 15

Zschernig v. Miller, 389 U.S. 429 (1968) ..... 15

**Statutes Cited:**

28 U.S.C. Sec. 1257(3) ..... 2

Breton Woods Agreement Act:

22 U.S.C. Sec. 286 ..... 2, 3, 8, 9, 10, 11, 12, 13, 17

22 U.S.C. Sec. 286h ..... 4, 11

International Monetary Fund Agreement, 60 Stat. 1401, T.I.A.S. 1501:

Art. VII, Sec. 2b ..... 12, 13

Art. VIII, Sec. 2b ..... 4, 8, 10

**United States Constitution Cited:**

Commerce Clause:

Article I, Sec. 8, Clause 3 ..... 2, 8, 9, 17, 19



*Contents*

*Page*

Supremacy Clause:

Article VI, Clause 2 ..... 2, 3, 8, 9, 16

**Other Authorities Cited:**

Dicey & Morris, The Conflict of Laws, p. 160 (8th ed. 1967) ..... 13, 16

Meyer, Recognition of Exchange Controls After the International Monetary Fund Agreement, 62 Yale L.J. 867 (1953) ..... 11

1 Oppenheim, International Law, 1449 (8th ed. 1955) ..... 16

1 Proceedings and Documents of the United Nations Monetary and Financial Conference, 502, 543, 576 ..... 11

H.R. Rep. No. 629, 79th Cong., 1st Sess. 70 (1945) ..... 11

Sen. Rep. No. 452, 79th Cong., 1st Sess. 28 (1945) ..... 11

**APPENDIX**

Opinion of Court of Appeals ..... 1a

Remittitur ..... 18a

*Contents*


| | Page |
|---|---|
| Appellate Division, First Department Order of Modification Appealed From | 22a |
| Opinion of Appellate Division, First Department | 25a |
| Order of Special Term Appealed From | 28a |
| Memorandum Decision of Special Term | 32a |
| Stay Order of Judge Jasen | 37a |


In The

# Supreme Court of the United States

October Term, 1975

No.

JOHN DOE NO. 1,

*Petitioner,*

*vs.*

BANCO FRANCES E BRASILIERO,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

## OPINIONS BELOW

The unreported decision of the New York State Supreme Court is reprinted in the Appendix at p. 32a. The opinion of the New York State Supreme Court, Appellate Division, is reported at 44 A.D.2d 353, 35 N.Y.S.2d 145 (1st Dept. 1974), and is reprinted in the Appendix at p. 25a. The as yet unreported opinion of the New York Court of Appeals is printed in the Appendix at p. 1a.

## JURISDICTION

The decision sought to be reviewed is dated May 8, 1975. The remittitur is dated May 8, 1975. This Court has jurisdiction pursuant to 28 U.S.C. Section 1257(3).

## QUESTIONS PRESENTED

Does a state court decision to recognize and enforce the internal currency control laws of Brazil violate the Commerce Clause and the Supremacy Clause of the United States Constitution on the ground that:

(a) it is either pre-empted by or conflicts with the Bretton Woods Agreement Act authorizing United States membership in the International Monetary Fund; or

(b) it is pre-empted by Congress' plenary power to regulate foreign commerce and the President's power over foreign affairs; or

(c) it conflicts with the congressionally sanctioned common law rule against enforcement of foreign government revenue and currency control laws?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 3 of the United States Constitution provides:



> "The Congress shall have the power . . . to regulate commerce with foreign nations, and among the Several States and with the Indian tribes . . . ."

Article VI, Clause 2, of the United States Constitution provides:

> "This Consitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

22 U.S.C. Section 286 provides:

> "The President is authorized to accept membership for the United States in the International Monetary Fund (hereinafter referred to as the 'Fund'), and in the International Bank for Reconstruction and Development (hereinafter referred to as the 'Bank'), provided for by the Articles of Agreement of the Fund and the Articles of Agreement of the Bank as set forth in the Final Act of the United Nations Monetary and Financial Conference dated July 22, 1944, and deposited in the archives of the Department of State. July 31, 1945, c.339, §2, 59 Stat. 512."

22 U.S.C. Section 286h provides:

> "The provisions of article IX, sections 2 to 9, both inclusive, and the first sentence of article VIII, section 2(b), of the Articles of Agreement of the Fund, and the provisions of articleVI, section 5(i), and article VII, sections 2-9, both inclusive, of the Articles of Agreement of the Bank, shall have full force and effect in the United States and its Territories and possessions upon acceptance of membership by the United States in, and the establishment of, the Fund and the Bank, respectively. July 31, 1945, c.339 §11, 59 Stat. 516."

Article VIII, section 2b of the International Monetary Fund Agreement, 60 Stat. 1401, 1411, T.I.A.S. 1501, provides:

> "Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, cooperate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this Agreement."



## STATEMENT OF THE CASE

The plaintiff is a Brazilian bank with an office in Sao Paulo, Brazil. The Central Bank of Brazil authorizes it to conduct currency exchange operations for Brazilian travelers. Plaintiff alleges that the petitioner, an unidentified Brazilian citizen, among other Brazilians, purchased from plaintiff with Brazilian cruzeiros a substantial number of American travelers checks. The purchase occurred in Brazil at the then current exchange rates. Nevertheless, the plaintiff alleges that the purchase violated the internal currency exchange laws and decrees of Brazil and the regulations of the Central Bank of Brazil because the defendants, petitioner among them, exchanged more cruzeiros for dollars than the Brazilian law then permitted Brazilian travelers to remove from Brazil. There is no claim that the plaintiff lost money on the exchange itself.

Subsequently, the travelers checks were deposited in, among other places, the Bankers Trust Company in New York City. The plaintiff sued the petitioner, John Doe No. 1, and other unknown Brazilians, seeking: (i) equitable rescission of the exchange on the ground that it violated Brazil's internal currency control laws, and (ii) $100,000 compensation in anticipation of the sanctions and penalties that the Central Bank of Brazil would impose upon plaintiff for entering into the transaction.

The summons and complaint were served by an order of publication following an attachment of funds in John Doe No. 1's pseudonymous account at the Bankers Trust Company. In addition, the plaintiff has noticed the deposition of Bankers Trust Company in order to learn the identity of John Doe No. 1.

The New York State Supreme Court, Appellate Division, dismissed the complaint on the grounds that, in effect, it sought to enforce the currency control regulations of a foreign government. The New York State Court of Appeals, one Judge dissenting, overturned the prohibition against the enforcement by American courts of a foreign nation's currency control laws. The dissenting Judge believed that any change in this prohibition required national uniformity and should be instituted by the federal government. He wrote:

> "The core of the issue here is enforcement of a Brazilian currency exchange regulation. The only 'reparation' sought by this plaintiff is for damages sustained in consequence of violation of that regulation — penalties to be imposed on it by the Brazilian government plus associated injury to its business and reputation in consequence of such violation. Damages which are wholly attributable to violation of such a regulation, although alleged to have been occasioned by defendants' fraud, do not convert the action to one solely for private reparation. The ultimate economic reality, of granting relief to the plaintiff bank, would be the imposition on defendants of sanctions for violation of currency exchange control.
>
> * * *
>
> I consider the plaintiff's complaint as an attempt to utilize the judicial machinery of our



courts to enforce the exercise of the sovereign power by the government of Brazil. I believe that our courts, under traditional and established principle, are not available for this purpose.

The majority, however, argues that the time may have come for a change in what historically has been the applicable rule. I recognize that strong arguments can be mounted for a change in view of the increased frequency and importance of international commerce and the significantly different perspective in today's world in which one nation views another nation and its interests. In my opinion, however, the responsibility for any change lies with our federal government rather than with the highest court of any single state. *Change, if at all, in my view, would better come at the hands of the State Department and the Congress, through the negotiation of international agreement or otherwise in the discharge of the constitutional responsibility of the federal government 'regulate commerce with foreign nations'* (cf. *Bretton Woods Agreement Act, supra*). A fitting sense of judicial restraint would dictate that the courts of no single state should enunciate a change, however large that state's relative proportion of foreign commerce may be, particularly since the authoritative effect thereof would necessarily be confined to the borders of that state." (Emphasis added.)

Thus, the federal constitutional question of the possible conflict with or pre-emption by the Commerce Clause, the power to make foreign policy and the Bretton Woods Agreement Act was considered and rejected by the highest New York State court. On June 17, 1975, Hon. Matthew J. Jasen of the State Court of Appeals stayed that Court's mandate pending hearing and determination of this petition, and, if granted, pending hearing and determination of the review on the merits, on condition that the petition be filed on or before July 16, 1975. See Appendix at p. 37a.

## REASONS FOR GRANTING THE WRIT

The Supremacy Clause of the United States Constitution prohibits a state law that (a) conflicts with an appropriate exercise of federal power, or (b) occurs in an area that has been pre-empted by an appropriate exercise of federal power, or (c) occurs in an area in which, although the federal government has not exercised its power, requires national uniformity.

The important federal questions raised here and not before confronted by this Court are:

(1) Is a state court's common law pronouncement "law" for purposes of the Supremacy Clause?

(2) Is a state court decision to enforce a foreign nation's currency control laws either in conflict with or pre-empted by the Bretton Woods Agreement Act and the International Monetary Fund?



(3) Alternatively, is the common law rule, applied by the federal courts including the Supreme Court and sanctioned by congressional inaction, prohibiting enforcement of foreign nation currency control laws "conflicting federal law" for purposes of the Supremacy Clause?

(4) Alternatively, is this an area where uniformity is necessary so that a decision to enforce foreign nation currency control laws should be made, on a national basis, under the Presidential power to control foreign affairs or by Congress under the Commerce Clause?

**(a) The state high court decision is "law" for purposes of the Supremacy Clause.**

Although most Supremacy Clause cases concern state legislative enactments in conflict with or pre-empted by congressional statutes, the thrust of the Supremacy Clause is to invalidate such state pronouncements regardless of how they occur. So it has been repeatedly held that even a state high court decision inconsistent with federal power is invalidated by the Supremacy Clause. See, *e.g.*, *Morgan v. Commonwealth of Virginia*, 328 U.S. 373, 378-79 (1946); *United States v. Belmont*, 301 U.S. 324, 327, 331 (1937) ("state policy"); *Whiteside v. Southern Bus Lines*, 177 F.2d 949, 950 (6th Cir. 1949).

**(b) The state court decision conflicts with or is pre-empted by the Bretton Woods Agreement Act.**

In the Bretton Woods Agreement Act, 22 U.S.C. Sections 286 *et seq.*, Congress authorized United States membership in

the International Monetary Fund, 60 Stat. 1401, T.I.A.S. 1501. This fund provides detailed and extensive regulation of international monetary arrangements. Nowhere in its text does it require or provide for one member's affirmative enforcement of another member's internal currency control regulations.

In fact, the Bretton Woods Agreement Act contains an express congressional intention *not* to change the common law rule against enforcement of a foreign nation's currency control regulations. Article VIII, Section 2(b), contains the following two important sentences:

> "Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, cooperate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this Agreement."

The first of these two sentences provides that certain exchange contracts "shall be unenforceable" in the territories of the Fund members. This is a defensive provision only. The second sentence, however, provides that the Fund members may adopt measures making their currency control regulations "more effective." This sentence contains the potential for affirmative recognition among members of internal currency control laws.



In authorizing membership in the International Monetary Fund, Congress carefully distinguished between these two sentences. In 22 U.S.C. Section 286h, *supra*, Congress said that the first sentence *but not the second sentence* of Section 2(b) "shall have full force and effect in the United States . . . ." In fact, a proposal to create an affirmative obligation to assist in the enforcement of another member's currency control laws was defeated at Bretton Woods. 1 Proceedings and Documents of the United Nations Monetary and Financial Conference 502, 543, 576.

"Since unenforceability is a negative concept, it follows that no member need take any positive action to police or enforce another's regulation." Meyer, *Recognition of Exchange Controls After the International Monetary Fund Agreement*, 62 Yale L.J. 867, 895 (1953). Nussbaum, *Exchange Control and the International Monetary Fund*, 59 Yale L.J. 421, 429 (1950). The legislative history supports the contention that only the "negative concept" was intended. H. R. Rep. No. 629, 79th Cong., 1st Sess., 70 (1945); Sen. Rep. No. 452, 79th Cong., 1st Sess., 28 (1945).

Congress, then, by statute and by international compact, has established extensive regulations for the international control of monetary systems. It has done this without changing or in any way acknowledging the possibility of a change in the federally enforced common law rule against enforcement of foreign currency regulations. An effort to ignore this rule conflicts with the Bretton Woods compact. *Missouri v. Holland*, 252 U.S. 416 (1920).

The Bretton Woods Agreement Act can be seen either as in conflict with or pre-empted by state regulation in this area. Compare *Campbell v. Hussey*, 368 U.S. 297 (1961) (pre-emption) with *Perez v. Campbell*, 402 U.S. 637 (1971) (conflict). A conflict seems apparent. The federal government has expressly declined to obligate the United States or its "territories" affirmatively to enforce foreign nation currency control laws. Congress has refused to make the second sentence of Article VII, Section 2(b), of the International Monetary Fund the law of the land. Nor has the federal government agreed, pursuant to the second sentence of Article VII, Section 2(b), with any other member of the Fund to give affirmative enforcement to internal currency control laws. Congress has not attempted in any other way to overturn the common law rule against enforcement of such laws. All these factors indicate a strong congressional decision not to change the rule against such enforcement. A contrary state court decision conflicts directly with this congressional choice.

Alternatively, the pervasive Bretton Woods Agreement Act and the International Monetary Fund can be seen as occupying the field and pre-empting state activity in this area. Key factors in the determination of pre-emption are: (1) the pervasiveness of the federal regulation, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947); (2) the dominance of the federal interest in the area, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143-44 (1963), and (3) the objectives of the federal regulation and whether non-federal regulation obstructs the full execution of those aims, *Perez v. Campbell, supra*, at p. 649.

On each of these tests, New York's action fails. First, federal regulation of international monetary relationships has



been pervasive. One need only pour through the Bretton Woods Agreement Act and the International Monetary Fund to recognize that. In addition, numerous other monetary arrangements have been made between the United States and other countries, from American participation in the World Bank to its participation in the International Bank for Reconstruction and Development. Second, it seems obvious that the federal interest in the relationship between the United States and foreign nations in the area of international monetary controls dominates substantially over — even to the point of exclusion of — any particular state's interests.

Finally, an objective of the federal regulation, according to the legislative history of the Bretton Woods Agreement Act, *supra*, is to establish international monetary stability. Non-federal regulation in this delicate area can easily obstruct federal policy. It is not hard to see how. Enforcement of a foreign nation's currency laws equals a recognition of that nation's sovereign authority. Dicey & Morris, *The Conflict of Laws*, p. 160 (8th ed. 1967). It is for Congress, not local state courts, to determine such questions as whether a particular foreign government or its revenue laws should be recognized in the United States and the effect of recognition on international relations, whether reciprocity should be demanded, etc. Furthermore non-federal regulation raises the real possibility that different state courts will respond to these issues in inconsistent and embarrassing ways. This is an area where uniformity is necessary.

In *Kolovrat v. Oregon*, 366 U.S. 187 (1961) the Court had to consider the constitutionality of certain Oregon laws

prohibiting inheritance by foreign nationals in certain cases. A unanimous Court invalidated the laws as inconsistent with certain treaties and agreements between the United States and the foreign country there involved. Said the Court:

> "These treaties and agreements [including Bretton Woods] show that this Nation has adopted programs deemed desirable in bringing about, so far as can be done, stability and uniformity in the difficult field of world monetary controls and exchange. These arrangements have not purported to achieve a sufficiently rigid valuation of monies to guarantee that foreign exchange payments will at all times, at all places and under all circumstances be based on a single 'definitely ascertainable' valuation measured by the diverse currencies of the world. Doubtless these arrangements may fall short of that goal. *But our National Government's powers have been exercised so far as deemed desirable and feasible toward that end, and the power to make policy with regard to such matters is a national one from the compulsion of both necessity and our Constitution.* After the proper governmental agencies have selected the policy of foreign exchange for the country as a whole, Oregon, of course, cannot refuse to give foreign nationals their treaty rights because of fear that valid international agreements might possibly not work completely to the satisfaction of state authorities. [366 U.S. at 198]." (Emphasis added.)



See, also: *Zschernig v. Miller,* 389 U.S. 429, 440-41 (1968).

These cases involved local inheritance laws invalidated because they interfered with the federal government's programs for "stability and uniformity in the difficult field of world monetary controls and exchange." The rule against enforcement of foreign currency control laws is part of those same programs. In both cases, the federal government primary authority, expressed by treaty and statutes, forecloses local action.

**(c) The well-established federal common law rule prohibits enforcement of foreign national currency control laws.**

The United States inherited the English common law rule that one jurisdiction does not enforce the tax laws, currency regulations, or the statutory penalties or forfeitures of another jurisdiction. *Holman v. Johnson,* 98 E.R. 1120 (1775) ("no country ever takes notice of the revenue laws of another"); *Plance v. Fletcher,* 1 Doug. K.B. 251 (1779) (both opinions *per* Lord Mansfield). See, also: *Rossano v. Manufacturers Ins. Co.,* 2 All. E.R. 214, 229 (1962) (in "no circumstances will the courts directly or indirectly enforce the revenue laws of another country . . .").

Numerous decisions of this Court have adopted the principle. *The Antelope,* 23 U.S. 66, 123 (1825) (Marshall, Ch. J.) ("The Courts of no country execute the penal laws of another . . ."); *Wisconsin v. Pelican Ins. Co.,* 127 U.S. 265, 290 (1888); *Huntington v. Attrill,* 146 U.S. 657 (1892). See, also: *Moore v. Mitchell,* 30 F.2d 600, 603 (2nd Cir., 19 ) (L. Hand, J., concurring).

This common law rule is supported by numerous authorities. See, *e.g.*, 1 Oppenheim, *International Law*, Section 144a, n. 4 (8th ed. 1955) (it represents a refusal to enforce a foreign state's sovereign authority); Dicey & Morris, *The Conflict of Laws*, p. 160 (8th ed. 1967).

In 1963, the New York Court of Appeals itself declined affirmatively to enforce the currency control laws of the very same country involved here, Brazil, in a case with facts practically indistinguishable from the ones here. *Banco do Brasil v. A.C. Israel Commodity Co.*, 12 N.Y.2d 371, 239 N.Y.S.2d 872 (1963). This Court denied review of that decision. 376 U.S. 906 (1964).

Petitioner contends that it is an important question, worthy of review, whether this centuries-old federal expression of a well-established common law rule amounts to an adoption of the rule, through congressional non-action, as an expression of the power to regulate foreign commerce.

**(d) A common law rule can be "conflicting federal law" for purposes of the Supremacy Clause.**

Although, traditionally again, Supremacy Clause questions involve congressional enactments that conflict with or pre-empt state laws, Congress may indicate by *non-action* its intent to adopt as federal policy a well-established common law principle. In *Hall v. DeCuir*, 95 U.S. 485, 490 (1877), the Court said:

> "This congressional power of regulation may be exercised without legislation as well as with it. By refraining from action, Congress, in effect, adopts as its own regulations those which the common law . . . has provided for the government of such business . . . . In fact, congressional legislation is only necessary to cure defects in existing laws, as they are discovered, and to adapt such laws to new developments of trade."



See, also: *Western Tel. Co. v. Cal. Pub. Co.*, 181 U.S. 92, 101-02 (1901); *Interstate Commerce Commission v. B & O Railroad*, 145 U.S. 263, 275 (1892); *Southern Pacific Co. v. State of Arizona*, 325 U.S. 761, 768 (1945) (that Court will presume congressional intent "where Congress has not spoken").

**(e) The state ruling is inconsistent with Congress' power to regulate foreign commerce and the President's power to regulate foreign affairs.**

Even without the Bretton Woods Agreement Act, and even absent the well-established, federally recognized rule against the enforcement of foreign currency control laws, this is an area in which uniformity is necessary. Accordingly, only Congress under the Commerce Clause, and not each state government independently, has the power to decide when to recognize foreign currency control laws, whose laws will be recognized, the conditions of recognition including demands of reciprocity, and the political consequences of recognition.

In *Henderson v. Mayor of New York*, 92 U.S. 259 (1875), a New York City law required the master or owner of every vessel

landing in New York from a foreign port to pay the city a certain sum to indemnify it against any expense for the relief or support of the vessel's passengers. This Court invalidated the law.

> "It is equally clear that the matter of these statutes may be, and ought to be, the subject of a uniform system or plan. The laws which govern the right to land passengers in the United States from other countries ought to be the same in New York, Boston, New Orleans, and San Francisco." (92 U.S. at 273). (See, also: *Chy Lung v. Freeman*, 92 U.S. 275 (1875).)

Congress' power over foreign commerce is unquestionably extensive, indeed perhaps more extensive than its power over interstate commerce. *Missouri v. Holland, supra. California Bankers' Assoc. v. Shultz*, 416 U.S. 21 (1974). In the area of interstate commerce, where Congress has not enacted conflicting legislation, state laws affecting such commerce have been upheld where their aim has been "to protect the health and safety of the public." In other words, this Court has recognized a state's strong interest in the exercise of its police powers, notwithstanding indirect interference with interstate commerce. See, *e.g., Southern Pacific Co. v. State of Arizona, supra*, 325 U.S. at 766-77.

However, where the state law is not an exercise of its police powers, or where uniformity is necessary, the Court has been quick to invalidate the state rules. *Gibbons v. Ogden*, 9 Wheat. 1 (1824). Whether "this long recognized distribution of power



between the national and state governments is predicated upon the implication of the Commerce Clause itself [cases cited] or upon the presumed intention of Congress, where Congress has not spoken [cases cited] the result is the same." *Southern Pacific Co. v. State of Arizona, supra*, at 768.

Alternatively, the state's action interferes with a second federal power — the power to regulate foreign affairs. Whether, on these facts, the power belongs to Congress, *Perez v. Brownell*, 356 U.S. 44 (1958), or the President, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), the state's action detracts from the need for uniformity that is contemplated by a central federal power to regulate foreign affairs.

Here, petitioner has already argued why uniformity is necessary. Furthermore, the holding below is in no way an exercise of New York's police power. It does not involve the health and safety of New Yorkers. It is rather a clear state effort to operate in the area of foreign commerce and foreign affairs. Petitioner respectfully suggests that this effort should not pass without opportunity for Supreme Court review.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

s/ Martin E. Silfen
*Attorney for Petitioner*

WARNER and GILLERS P.C.
Stephen Gillers
Martin E. Silfen
*Of Counsel*



## APPENDIX

## OPINION OF COURT OF APPEALS

STATE OF NEW YORK
COURT OF APPEALS

No. 141

1

Banco Frances e Brasileiro, S. A.

Appellant,

vs.

John Doe #1, &c.,

Respondent,

and

John Doe #2, &c., et al,

Defendants

and

Martin E. Silfen, Esq.,

Respondent.

JASEN, J.:

The principle question before us is whether a private foreign bank may avail itself of the New York courts in an action for damages for tortious fraud and deceit and for rescission of currency exchange contracts arising from alleged violations of foreign currency exchange regulations.

Plaintiff, a private Brazilian bank, brings this action for fraud and deceit, and conspiracy to defraud and deceive, against twenty "John Doe" defendants whose identities are unknown to it. The gravamen of plaintiff's complaint is that these defendants over a period of approximately six weeks participated, in violation of Brazilian currency regulations, in the submission of false applications to Banco-Brasileiro of Brazil, which the plaintiff relied upon, resulting in the improper exchange by the bank of Brazilian cruzeiros into travelers checks in United States dollars totalling $1,024,000. A large amount of the fraudulently obtained travelers checks were deposited by defendant "John Doe No. 1" in an account having a code name of "Alberta" at Bankers Trust Company, New York. Other of such travelers checks were deposited by defendant "John Doe No. 2" in an account having the code name of "Samco" at Manfra Tordella & Brookes, Inc., New York. An order of attachment was granted at Special Term .

Subsequent to the granting of the order of attachment and the service of the summons by publication, motions were made by the plaintiff for disclosure from Bankers Trust Co. and Manfra Tordella & Brookes of the true names and addresses of John Doe Nos. 1 and 2 and to direct the attorney for defendant John Doe No. 1 to disclose the true names(s) and address(es) of





defendant(s) and the basis of the attorney's authority to act, or, in the alternative, to vacate his appearance in the action. The defendant John Doe No. 1, by way of order to show cause, moved to vacate the order of attachment, to dismiss plaintiff's complaint and to intervene in the motion of plaintiff for disclosure from Bankers Trust Co. so as to defend against the disclosure.

Special Term, *inter alia*, denied the motion to vacate the order of attachment and to dismiss the complaint except as to the third cause of action for damages which was dismissed for failure to plead actual damages. Motions for ancillary relief — for discovery and inspection and for disclosure from the attorney for defendant "John Doe No. 1" of the name and address of his client — were granted.

On cross appeals, the Appellate Division, by a unanimous court, relying on *Banco do Brasil v. Israel Co.* (12 N Y 2d 371, cert. den. 376 U. S. 906), modified by granting defendants' motion to dismiss the complaint and denying all applications for ancillary relief on the ground that the New York courts were not open to an action arising from a tortious violation of foreign currency regulations.

Plaintiff bank appeals as of right to this court. (CPLR, § 5601[a].) We are unable to assent to the decision of the Appellate Division and, accordingly, modify the order appealed from by reinstating the order of attachment and the first two causes of action, with leave to plaintiff, if so advised, to apply to Special Term for permission to serve a supplemental pleading

alleging special damages in its third cause of action for damages, and by granting the ancillary relief requested to the extent hereafter specified.

It is an old chestnut in conflict of laws that one state does not enforce the revenue laws of another. By way of rationale, an analogy is drawn to foreign penal laws, extrastate enforcement of which is denied (see *The Antelope*, 10 Wheat. 66, 123) to deny recognition to foreign tax assessments, judicially expanded also to include foreign currency exchange regulations. The analogy, reformulated in the Restatement (A. L. I. Restatement of the Law, Conflict of Laws, §§ 610, 611), but interestingly withdrawn in the Restatement Second (§ 89), traces from Lord Mansfield's now famous dictum in an international smuggling case that "no country ever takes notice of the revenue laws of another." (*Holman v. Johnson*, 1 Cowp. 341, 98 Eng. Rep. 1120.) But the modern analogy of the revenue law rule is justifiable neither precedentially nor analytically.

*Holman v. Johnson* was an action for goods had and received. The plaintiffs, Frenchmen, sold and delivered tea to the defendant in France. The tea was then smuggled into England by the defendant in violation of the revenue laws. In an action for the price, Lord Mansfield's holding was simply to the effect that a French court would not invalidate a sale of tea by a Frenchman in France made in violation of an English prohibition. The decision was concerned largely with the impact of foreign revenue laws on international commerce, but the quoted dictum became the basis in this country for denying foreign tax authorities the right to collect taxes assessed by



them. But certainly that case and earlier (e.g., *Boucher v. Lawson*, 95 Eng. Rep. 53) and later (e.g., *Plane v. Fletcher*, 1 Dougl. 251, 99 Eng. Rep. 164) dicta in other cases denying extraterritorial effect to forum defenses, should not have been relied upon to deny forum effect to foreign claims.

Nor is the rule analytically justifiable. Indeed, much doubt has been expressed that the reasons advanced for the rule, if ever valid, remain so. (E.g., Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 Harv. L. Rev. 193.) But inroads have been made. In interstate cases, for example, where the rule made least sense, administrative tax assessments are increasingly equated with tax judgments (*Milwaukee County v. M. E. White Co.*, 296 U. S. 268) and on that basis generally afforded full faith and credit. (*Oklahoma v. Neely*, 150 Ark. 230; Enrenzweig, Treatise on the Conflict of Laws, § 49; but see *City of Philadelphia v. Cohen*, 11 N Y 2d 401.) Some do consider that, in light of the economic interdependence of all nations, the courts should be receptive even to extranational tax and revenue claims as well, especially where there is a treaty involved, but also without such constraint. (Scoles, *Interstate and International Distinctions in Conflict of Laws in the United States*, 54 Calif. L. Rev. 1599, 1607-1608.) Indeed, there may be strong policy reasons for specially favoring a foreign revenue regulation, using that term in its broadest sense, especially one involving currency exchange or control.

In the international sphere, cases involving foreign currency exchange regulations represent perhaps the most important aspect of the revenue law rule. This assumes, of course, that a

currency exchange regulation, normally not designed for revenue purposes as such, but rather, to prevent the loss of foreign currency which in turn increases the country's foreign exchange reserves, is properly characterizable as a revenue law. (Contra, *Kahler v. Midland Bank*, [1950] A. C. 24; Dicey, Conflict of Laws, p. 920 [7th ed.].) At any rate, it is for the forum to characterize such a regulation and in this State the question would appear to have been resolved for the present at least by *Banco do Brasil v. Israel Co.* (12 N Y 2d 371, 377, cert. den. 376 U. S. 906, *supra*).

But even assuming the continuing validity of the revenue law rule and the correctness of the characterization of a currency exchange regulation thereunder, United States membership in the International Monetary Fund (IMF) makes inappropriate the refusal to entertain the instant claim. The view that nothing in Article VIII, section 2(b) of the Bretton Woods Agreements Act (60 U. S Stat. 1401, 1411[1]) requires an American court to provide a forum for a private tort remedy, while correct in a literal sense (see *Banco do Brasil v. Israel Co., supra*, at p. 376), does not represent the only perspective. Nothing in the Agreement prevents an IMF member from aiding, directly or indirectly, a fellow member in making its exchange regulations

1. There it is provided in relevant part:

> "Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, cooperate in measures for the purpose of making the exchange control regulations of either member more effective. . . ."





effective. And United States membership in the IMF makes it impossible to conclude that the currency control laws of other member states are offensive to this State's public policy so as to preclude suit in tort by a private party. Indeed, conduct reasonably necessary to protect the foreign exchange resources of a country does not offend against international law. (A. L. I. Restatement [Second], Foreign Relations Law of the United States, § 198, comment b.) Moreover, where a true governmental interest of a friendly nation in involved — and foreign currency reserves are of vital importance to a country plagued by balance of payments difficulties — the national policy of cooperation with Bretton Woods signatories is furthered by providing a State forum for suit.

The *Banco do Brasil* case relied upon by the Appellate Division is quite distinguishable. There the government of Brazil, through Banco do Brasil, a government bank, sought redress for violations of its currency exchange regulations incident to a fraudulent coffee export transaction. Here, the plaintiff is a private bank seeking rescission of the fraudulent currency exchange transactions and damages. And no case has come to our attention where a private tort remedy arising from foreign currency regulations has been denied by the forum as an application of the revenue law rule and we decline so to extend the *Banco do Brasil* rationale. Thus, in the instant case we find no basis for reliance upon the revenue law rule to deny a forum for suit. Moreover, where the parties are private, the "jealous sovereign" rationale is inapposite (cf., *Loucks v. Standard Oil Co.*, 224 N. Y. 99, 102-103 [Cardozo, J.]) even as it might seem inapposite in the *Banco do Brasil* situation where the sovereign

itself, or its instrumentality, asks redress and damages in a foreign forum for violation of the sovereign's currency laws. (But cf., *Moore v. Mitchell*, 30 F 2d 600, 603 [L. Hand, J. concurring].)

*Perutz v. Bohemian Discount Bank in Liquidation* (304 N. Y. 533) is consistent with an expansive application of the IMF agreement to which we here ascribe (cf., *Kolovrat v. Oregon*, 366 U.S. 187, 196-198), although there it is true defensive use of foreign currency exchange regulation was made and upheld by this court. But interestingly, in *Perutz*, in contrast to the instant case, political relations at the time were not conducive to comity which nevertheless was extended.

With regard to the ancillary relief sought — discovery and inspection of Bankers Trust and Manfra Tordella & Brookes — we agree with Special Term that it should be granted to the extent stated by that court. And insofar as disclosure is sought from the attorney for John Doe No. 1 of the true name and address of his client, we conclude that on the record before it Special Term did not abuse its discretion in ordering disclosure. (CPLR, § 4503; *Matter of Kaplan* [*Blumfeld*], 8 N Y 2d 214, 218-219.) But that is not to say that in a given situation disclosure might be inappropriate because it is inconsistent with the purpose of representation. Therefore, we would add the caveat that if consistent with this trust and the duty assumed to his client, the attorney for John Doe No. 1 cannot disclose his client's true identify, his right, alternatively, to withdraw from this case must be recognized.



Finally, subsequent to the commencement of this action, a penalty was levied by the Central Bank of Brazil, and paid by the plaintiff, on account of the alleged fraudulent currency exchange transactions. Therefore, our decision today is without prejudice to a proper application by plaintiff to Special Term to allege by supplemental pleading such sum as an element of special damages on the third cause of action. (CPLR, 3025[b]; cf., *Morrison v. National Broadcasting Co.*, 19 N Y 2d 453.)

Accordingly, the order of the Appellate Division should be modified in accordance with the views here expressed and the action remitted to the Supreme Court, New York County.

Banco Frances e Brasileiro S.A.
v. John Doe No. 1

WACHTLER, J. (dissenting)

We are asked to determine when claims between private parties which spring from jural relationships created by the laws of a foreign country, here Brazil, may be enforced in our courts. The issue turns on the essential nature of the rights and obligations sought to be enforced as the forum court characterizes them. As stated by the United States Supreme Court:

> The test is not by what name the statute is called by the legislature or the Court of the State in

> which it was passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a punishment of an offense against the public, or a grant of a civil right to a private person. *Huntington v. Attrill,* 146 U.S. 647, 683. Also *City of Philadelphia v. Cohen,* 11 N Y 2d 401, 406; *Maryland v. Turner,* 75 Misc. 9, 11.

I believe that the relief sought here, albeit indirectly through plaintiff bank, is an aspect of the Brazilian government's sovereign management of the economy of its own country. This is not a matter involving the resolution of private rights only as those rights are defined under the laws of a foreign state. Were that so our courts would not withhold judicial sanction even if the definition of such private rights were somewhat different from our own, "unless some sound reason of public policy makes it unwise for us to lend our aid" (*Loucks v. Standard Oil Company,* 224 N.Y. 99, 110).

There is no allegation in this complaint that defendants intended to or succeeded in defrauding plaintiff of foreign currency exchange in the private rights sense. On the contrary, from all that appears, defendants obtained no more U.S. dollars in consequence of their alleged fraud than they would have been entitled to receive at the then currently effective exchange rate for the Brazilian cruzeiros which they exchanged with plaintiff bank. The gravamen rather is that the fraud and deceit practiced by the defendants induced plaintiff bank to violate Brazilian currency exchange regulations, thereby exposing that bank to



consequent penalties which would be imposed by the Brazilian government.

It has long been recognized that the courts of one jurisdiction will not enforce the tax laws, penal laws, or statutory penalties and forfeitures of another jurisidction.

> "The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws . . . ." *Wisconsin v. Pelican Ins. Co.,* 127 U.S. 265, 290. Also *The Antelope,* 10 Wheat. 66, 122-23 [23 U.S. 30, 53-54; *Huntington v. Attrill, supra; Holman v. Johnson,* 1 Cowp. 341; *Banco do Brasil v. A.C. Israel Commodity Co.,* 12 N Y 2d 371, 377, cert. den. 376 U.S. 906; *City of Philadelphia v. Cohen, supra; James & Co. v. Second Russian Ins. Co.,* 239 N.Y. 248, 257.

Under the principle of territorial supremacy, fundamental to the community of nations, courts refuse to enforce any claim which in their view is a manifestation of a foreign state's sovereign authority (Dicey & Morris, *The Conflict of Laws,* 8th ed., 1967, p. 160; cf. Judge Learned Hand's concurring opinion in *Moore v. Mitchell,* 30 F 2d 600). The proper question is whether in the particular instance the claim sought to be enforced is a manifestation of such sovereign authority.

In previous cases our court held that governmental foreign exchange regulation may present an aspect of the exercise of sovereign power by a foreign state to implement its national fiscal policy. Thus, in *Banco do Brasil v. Israel Co., supra,* we decided that our courts were not open to enforce a Brazilian foreign currency exchange regulation. Although the regulation in that case was characterized as a revenue measure, the essence of the matter was that we declined to enforce what we considered to be an exercise of Brazil's sovereign power. Whether a regulation denominated "currency exchange regulation" has or does not have a revenue-producing effect, it must be presumed to have been adopted to accomplish fiscal regulation and ultimate economic objectives significantly similar to, if not identical with, the objectives which underly what would be characterized as revenue measures — namely, governmental management of its economy by a foreign country. Accordingly, the result is not determined by the threshold appearance of the particular law sought to be enforced or whether such law be denominated by the foreign government as a penal law or a revenue law or otherwise. The bottom line is that the courts of one country will not enforce the laws adopted by another country in the exercise of its sovereign capacity for the purpose of fiscal regulation and management.

Although our earlier decisions in *Perutz v. Bohemian Discount Bank in Liquidation,* 304 N.Y. 533, and *Industrial Export & Import Corp. v. Hongkong & Shanghai Banking Corp.,* 302 N.Y. 342, may appear to be to the contrary, a studied analysis dispels this apparent inconsistency. These cases merely refine the traditional conflict-of-laws rule by holding that the



provisions of any international agreement to which the United States is a party supplement, and to that extent, supersede the traditional rule. For instance, the Bretton Woods Agreement Act, 22 U. S. Code § 286, authorizes U.S. membership in the International Monetary Fund, 60 Stat. 1401, T.I.A.S. 1501. Another example of such a treaty is Section 2(b) of Article VIII of the International Monetary Fund Agreement making exchange contracts which are contrary to the exchange control regulations of a member (Brazil is a member) unenforceable in the territory of another member (United. States). So in *Perutz, supra,* relying on the provisions of the Bretton Woods Agreement Act we refused to enforce a private agreement contrary to Czechoslovakian exchange control regulations. Similarly, in *Industrial Export & Import Corp., supra,* we refused to enforce a private contract contrary to the currency regulations of China on the basis of a separate agreement between the United States and China. Thus, by treaty provision what would otherwise have been the applicable rule of judicial non-recognition of sovereign acts of a foreign state may be modified in the area of currency exchange control to require courts in the member states (including courts in the United States) to recognize foreign currency regulation as a *defense.*

Nothing in the Bretton Woods Agreement Act or in any other agreement between the United States and Brazil of which we are aware, however, mandates a complete abrogation of the normal conflicts rule or requires our courts *affirmatively* to enforce foreign currency regulation, as we are invited to do in the present case. This distinction was expressly recognized and held to be dispositive in *Banco do Brasil, supra,* in which we said

at p. 376: "An obligation to withhold judicial assistance to secure the benefit of such contracts [i.e., those violative of the foreign currency control regulation] does not imply an obligation to impose tort penalties on those who have fully executed them." (see Dicey & Morris, op. cit., pp. 161, n. 19; 898-900).

The appellant seeks to distinguish our decision in *Banco do Brasil* on the ground that the plaintiff in that case was recognized as an instrumentality of the Brazilian government. I find this unpersuasive. As Judge Cardozo noted in the *Loucks* case, *supra*, a statute will be deemed to reflect the sovereign's interest if it "awards a penalty to the State, or to a public officer in its behalf, or to a member of the public, suing in the interest of the whole community to redress a public wrong***. The purpose must be, not reparation to one aggrieved, but vindication of the public justice***." (*Loucks v. Standard Oil Co., supra*, pp. 102-103; cf. *Huntington v. Attrill, supra*, pp. 673, 681-682). Whenever vindication of the public interest is sought at the instance of a third person, as here by plaintiff bank, of necessity such third party must show "aggrievement" or no cause of action will lie. But any such formulation is incomplete.

The core of the issue here is enforcement of a Brazilian currency exchange regulation. The only "reparation" sought by this plaintiff is for damages sustained in consequence of violation of that regulation — penalties to be imposed on it by the Brazilian government plus associated injury to its business and reputation in consequence of such violation. Damages which are wholly attributable to violation of such a regulation,



although alleged to have been occasioned by defendants' fraud, do not convert the action to one solely for private reparation. The ultimate economic reality, of granting relief to the plaintiff bank, would be the imposition on defendants of sanctions for violation of currency exchange control.

I recognize that this case is not an instance of recourse sought by a foreign country in our courts for the direct enforcement of its foreign currency exchange regulations, as would be the case were the Brazilian Government seeking here to recover penalties from either Banco-Brasileiro or from the defendants. The rights of private parties will be significantly affected; it is alleged that plaintiff bank has suffered and will suffer detriment in its private capacity in consequence of the fraud and deceit of defendants. The resolution of the issued posed by the motion to dismiss does not depend on the incidental, inescapable fact that private rights have already been, and would be affected by the judicial relief sought. Rather, the determinative factor is that the primary objective and the ultimate practical effect of the relief sought would be the enforcement of the currency regulation system of a foreign country. Our courts are not open for the accomplishment of that end, and that it may be sought through private intermediaries does not change the result. It matters not whether enforcement is sought directly or indirectly (Dicey & Morris, op. cit., pp. 160-161).[1]

1. Indeed there might be a thorny issue as to whether enforcement is direct or indirect — i.e., whether a particular plaintiff should indeed be considered to be an "instrumentality" of a foreign government. Thus, our courts would be required to undertake an assessment of the practical impact and significance of the economic as well

*(Cont'd)*

*Opinion of Court of Appeals*

I consider the plaintiff's complaint as an attempt to utilize the judicial machinery of our courts to enforce the exercise of the sovereign power by the government of Brazil. I believe that our courts, under traditional and established principle, are not available for this purpose.

The majority, however, argues that the time may have come for a change in what historically has been the applicable rule. I recognize that strong arguments can be mounted for a change in view of the increased frequency and importance of international commerce and the significantly different perspective in today's world in which one nation views another nation and its interests. In my opinion, however, the responsibility for any change lies with our federal government rather than with the highest court of any single state. Change, if at all, in my view, would better come at the hands of the State Department and the Congress, through the negotiation of international agreement or otherwise in the discharge of the constitutional responsibility of the federal government "to regulate commerce with foreign nations" (cf. Bretton Woods Agreement Act, *supra*). A fitting sense of judicial restraint would dictate that the courts of no single state should enunciate a change, however large that state's relative proportion of foreign commerce may be, particularly since the authoritative effect thereof would necessarily be confined to the borders of that state.

*(Cont'd)*

as legal sanctions which the particular foreign government might bring to bear. The question would be whether the private corporation or other entity enjoyed such protected freedom of independent action that it should be determined, *de facto* as well as *de jure*, not to be an instrumentality of the foreign government. Our courts would normally be ill equipped to undertake such an inquiry, and to embark on it would be to reach for determination beyond our competency of satisfactory resolution.



*Opinion of Court of Appeals*

Accordingly, I believe the order of the Appellate Division should be affirmed.

* * * * * *

Order modified, without costs, and the case remitted to Supreme Court, New York County, for further proceedings in accordance with the opinion herein and, as so modified, affirmed. Opinion by Jasen, J. All concur except Wachtler, J., who dissents and votes to affirm in an opinion.

Decided May 8, 1975

**REMITTITUR**

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 21st day of February in the year of our Lord one thousand nine hundred and seventy-five, before the Judges of said Court.

WITNESS,

The HON. CHARLES D. BREITEL,
Chief Judge, *Presiding.*
JAMES M. FLAVIN, *Clerk.*
Joseph W. Bellacosa, Clerk.

REMITTITUR May 8, 1975

No. 74

1

Banco Frances e Brasileiro, S. A.

Appellant,

vs.



*Remittitur*

John Doe #1, &c.,

Respondent,

and

John Doe #2, &c., et al,

Defendants

and

Martin E. Silfen, Esq.,

Respondent.

Be it remembered, That on the 5th day of August in the year of our Lord one thousand nine hundred and seventy four, Banco Frances Brasileiro, S.A., the appellant in this cause, came here unto the Court of Appeals, by Davis, Polk & Wardwell, attorneys, and filed in the said Court a Notice of Appeal and return thereto from the Order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And John Doe No. 1 & 2 and Martin E. Silfen, the respondent in said cause, afterwards appeared in said Court of Appeals by Martin E. Silfen and Herman E. Cooper, their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

*Remittitur*

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Donald N. Dirks, of counsel for the appellant-, and by Mr. Martin E. Silfen, of counsel for respondent John Doe No. 1, and by Mr. Herman E. Cooper, of counsel for the respondent Martin E. Silfen, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is modified, without costs, and the case remitted to Supreme Court, New York County, for further proceedings in accordance with the opinion herein and, as so modified, affirmed. Opinion by Jasen, J. All concur except Wachtler, J., who dissents and votes to affirm in an opinion.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said order is modified, &c., AS AFORESAID.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

s/ Joseph W. Bellacosa
*Clerk of the Court of Appeals*
*of the State of New York.*



*Remittitur*

Court of Appeals, Clerk's Office,
*Albany*, May 8, 1975

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

s/ Joseph W. Bellacosa
*Clerk.*

Seal
STATE OF NEW YORK
COURT OF APPEALS

## APPELLATE DIVISION, FIRST DEPARTMENT ORDER OF MODIFICATION APPEALED FROM

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 9, 1974

Present

HON. ARTHUR MARKEWICH,
*Justice Presiding,*
FRANCIS T. MURPHY, JR.,
ARON STEUER,
GEORGE TILZER,
LOUIS J. CAPOZZOLI,
*Justices.*

---

BANCO FRANCÊS e BRASILEIRO S.A.,
Plaintiff-Respondent-Appellant,

against

JOHN DOE No. 1, the name "John Doe No. 1" being fictitious and the true name being unknown to plaintiff, said defendant is intended to be one of the persons who participated in the fraud and deceit alleged in the complaint and who maintains an account with Bankers Trust Company, New York, New York in the name of "Alberta",
Defendant-Appellant-Respondent,

and

JOHN DOE No. 2, the name "John Doe No. 2" being fictitious and the true name being unknown to plaintiff, said defendant



*Appellate Division, First Department Order of Modification Appealed From*

is intended to be one of the persons, firms or corporations who participated in the fraud and deceit alleged in the complaint and who is also known as "Samso" and John Does Nos. 3 through 20, the names "John Does Nos. 3 through 20" being fictitious and the true names being unknown to plaintiff, said defendants are intended to be the persons, firms and corporations in addition to "John Doe No. 1" and "John Doe No. 2" who participated in the fraud and deceit alleged in the complaint,
Defendants.

MARTIN E. SILFEN, ESQ.,
Appellant-Respondent.

---

Cross-appeals having been taken to this Court by the above-named appellants from the order of the Supreme Court, New York County (Waltemade, J.), entered on January 31, 1974, as set forth in their respective notices of appeal and cross-appeal,

And said appeals having been argued by Mr. Donald N. Dirks of counsel for plaintiff-respondent-appellant, by Mr. Herman E. Cooper of counsel for appellant Silfen, and by Mr. Martin E. Silfen of counsel for defendant-appellant-respondent; and due deliberation having been had thereon, and upon the Opinion of this Court filed herein,

It is unanimously ordered that the order so appealed from be and the same is hereby modified, on the law, by granting the defendants motions to dismiss the complaint and denying all applications for ancillary relief and, as so modified, affirmed. Appellant-respondent and defendant-appellant-respondent shall recover one bill of $60 costs and

*Appellate Division, First Department Order of Modification Appealed From*

disbursements of these appeals from plaintiff-respondent-appellant. The Clerk is directed to enter judgment in favor of defendant-appellant-respondent and appellant-respondent dismissing the complaint, with costs.

Enter:

HYMAN W. GAMSO
Clerk.



## OPINION OF APPELLATE DIVISION, FIRST DEPARTMENT

SUPREME COURT, APPELLATE DIVISION

FIRST DEPARTMENT, APRIL 1974

ARTHUR MARKEWICH, J.P.,
FRANCIS T. MURPHY, JR.
ARON STEUER,
GEORGE TILZER,
LOUIS J. CAPOZZOLI, JJ.

[SAME TITLE]

Cross appeals from an order of the Supreme Court (Waltemade, J.), entered in New York County on January 31, 1974. Plaintiff-respondent-appellant appeals from so much of the order as dismissed its third cause of action as insufficient; defendant-appellant-respondent John Doe No. 1 and appellant-respondent Martin E. Silfen, Esq., appeal from so much and such parts of the order as granted plaintiff's application for discovery and inspection of Bankers Trust Company, directed appellant-respondent Martin E. Silfen, Esq., to disclose the names of his clients, and denied the motion of defendant-appellant-respondent John Doe No. 1 to dismiss the remaining two causes of action of the complaint for insufficiency, lack of subject-matter jurisdiction, and *forum non conveniens*, and denied his motion to vacate the attachment and for intervention in the discovery application.

Donald N. Dirks of counsel (Mark L. Austrian with him on the brief; Davis Polk

& Wardwell, attorneys) for plaintiff-respondent-appellant.

Martin E. Silfen and Herman E. Cooper, attorneys for defendant-appellant.

STEUER, J.:

Plaintiff, a Brazilian banking institution, brings this action against two individuals whose names are unknown to it. The basis of plaintiff's cause of action is that these persons, by misrepresenting their identities, induced the bank to allow them to exchange Brazilian currency for American travelers checks, which exchange was contrary to Brazilian currency regulations. No other irregularity or impropriety in the transaction is alleged.

It is claimed that the checks were deposited in the Bankers Trust Company here in an account having a code name. An attachment was obtained and both parties moved for various forms of relief. We concern ourselves with only one of these, as it is dispositive of the entire lawsuit. That one is defendants' motion to dismiss the complaint for failure to state a cause of action. Special Term dismissed the third cause of action. The remaining causes of action seek rescission of the transaction above described.

It is one of the best established principles on the subject of conflict of laws that courts of one jurisdiction do not enforce the tax laws, currency regulations, or the statutory penalties or forfeitures of another (*Holman* v. *Johnson*, 1 Cowp. 341 (1775); Conflict of Laws, 8 N.Y. Jur., § 7, and 16 Am. Jur. 2d, § 6; 21 C.J.S., Courts, § 71). To this principle this state has consistently subscribed (*James & Co.* v. *Second Russian Ins. Co.*, 239 N.Y. 248, 257; *City of Philadelphia* v. *Cohen*, 11 N Y 2d 401). Accordingly our courts will not entertain a court action which seeks damages



for a tortious violation of foreign currency regulations (*Banco do Brasil* v. *Israel Co.*, 12 N Y 2d 371). It would follow that an application to rescind a contract based on the same grounds would not be entertained here.

The order entered January 31, 1974, New York County (Waltemade, J.) should be modified on the law by granting the defendants' motions to dismiss the complaint and denying all applications for ancillary relief and, as so modified, affirmed with one bill of costs to defendants.

ALL CONCUR.

## ORDER OF SPECIAL TERM APPEALED FROM

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of New York at the County Courthouse thereof, on the 31st day of January, 1974.

Present:

HONORABLE WILFRED A. WALTEMADE, *Justice*

[SAME TITLE]

Plaintiff Banco Francês e Brasileiro S.A. having moved by order to show cause dated July 16, 1973 for an order, pursuant to CPLR 3102(c) and CPLR 6220, for discovery and inspection of Bankers Trust Company and Manfra Tordella & Brookes, Inc., and

Plaintiff having further moved by order to show cause dated July 23, 1973 for an order, pursuant to CPLR 3101 (a) (4) and CPLR 3126, directing Martin E. Silfen, Esq., the alleged attorney for defendant(s) "John Doe No. 1" to forthwith disclose to the attorneys for plaintiff the true name(s) and address(es) of "John Doe No. 1" and the basis of his authority to act, or, in the alternative, to vacate his appearance in this action, and

Defendant(s) "John Doe No. 1" having moved by order to show cause dated July 24, 1973 for an order, pursuant to CPLR 6223, CPLR 3211(a)2, 7 and 8, and CPLR 327, vacating the order of attachment entered herein July 6, 1973, dismissing plaintiff's verified complaint and requiring plaintiff to bring its action in another forum and permanently staying such action in this Court, or dismissing it,





and for an order, pursuant to CPLR 1012 and CPLR 1013, permitting "John Doe No. 1" to intervene in said motion of plaintiff dated July 16, 1973 and, pursuant to CPLR 3103 and CPLR 3102(c), granting "Joe Doe No. 1" certain additional specified relief,

Now, after reading and filing said order to show cause, signed by Hon. Charles G. Tierney, dated July 16, 1973, the affidavit of Donald N. Dirks, sworn to July 16, 1973, and exhibits A through D annexed thereto, and the affidavit of service thereof, in support of said motion of plaintiff dated July 16, 1973, and the affirmation of Ferdinand J. Wolf dated September 17, 1973, in opposition to said motion of plaintiff dated July 16, 1973, and after reading and filing said order to show cause signed by Hon. George Postel dated July 23, 1973, the affidavit of Donald N. Dirks, sworn to July 23, 1973, and the affidavit of service thereof, in support of said motion of plaintiff dated July 23, 1973, and after reading and filing said order to show cause signed by Hon. George Postel dated July 24, 1973, the affidavit of Stephen Gillers, sworn to July 23, 1973, and exhibits A through C annexed thereto, the affidavit of service thereof, the reply affidavit of Martin E. Silfen, sworn to August 7, 1973, the supplemental affidavit of Martin E. Silfen, sworn to September 17, 1973, and the affidavit of Martin E. Silfen, sworn to November 21, 1973, in support of said motion of defendant(s) "John Doe No. 1" dated July 24, 1973, and the affidavit of Donald N. Dirks, sworn to July 26, 1973, the supplemental affidavit of Donald N. Dirks, sworn to September 11, 1973, and exhibits A through C annexed thereto, and the reply affidavit of Donald N. Dirks, sworn to September 19, 1973, in opposition to said motion of defendant(s) "John Doe No. 1" dated July 24, 1973, and after reading and filing the reply affidavit of Richard E.

Trent, sworn to September 14, 1973, and the supplemental affidavit of Vincent B. Mannino, sworn to October 25, 1973, on behalf of Bankers Trust Company, and after reading and filing the stipulation of the parties and garnishees dated August 28, 1973, and all of said motions having been duly submitted, and

DUE deliberation having been had and in accordance with the memorandum decision of this Court heretofore rendered and filed, it is

ORDERED that the three motions are consolidated for disposition, and it is further

ORDERED that plaintiff's motion for discovery and inspection of Bankers Trust Company and Manfra Tordella & Brookes Inc. is granted to the extent indicated in the original moving papers with the caveat that such discovery and inspection is not to be enlarged into a fishing expedition against Bankers Trust Company; and it is further

ORDERED, that Bankers Trust Company and Manfra Tordella & Brookes Inc. each appear and submit for examination before trial by an appropriate officer, agent or employee with respect to the matter sought in plaintiff's motion dated July 16, 1973; and it is further

ORDERED that said examinations shall take place at Special Term, Part II of this Court on February 28, 1974 at 10:00 A.M., or at such time and place as may be agreed to by the parties, and that any documents or records specifically identified at such time and which are material, relevant and necessary to the prosecution of the instant action may be the subject of a later notice to produce; and it is further

ORDERED that plaintiff's motion for disclosure from Martin E. Silfen, Esq., the attorney for defendant(s) "John Doe No. 1", is granted; and it is further



ORDERED that Martin E. Silfen, Esq. serve upon plaintiff, within ten days after service of a copy of this order with notice of entry thereof, a list disclosing the names and addresses of his clients in this action; and it is further

ORDERED that the motion of "John Doe No. 1" to dismiss the complaint is denied, except that the third cause of action alleged in the complaint is dismissed; and it is further

ORDERED that the motion of "John Doe No. 1" to vacate the order of attachment entered herein July 6, 1973 is denied; and it is further

ORDERED that the motion of "John Doe No. 1" to intervene is denied; and it is further

ORDERED that the motion of "John Doe No. 1" in all other respects is denied.

**Enter**

**/s/ W.A.W.**
**J.S.C.**

## MEMORANDUM DECISION OF SPECIAL TERM

SUPREME COURT

SPECIAL TERM

NEW YORK COUNTY

PART I

[SAME TITLE]

WILFRED A. WALTEMADE, J.:

The three motions involving the parties in this action all of which were returnable on the same date, are consolidated for disposition as follows:

In this rather unique situation, "John Doe No. 1", otherwise not further identified, is one of the defendants in an action yet to be formally commenced by service of the summons and complaint by plaintiff, Banco Frances e Brasileiro S.A. (hereinafter referred to as Banco-Brasileiro), moves (1) for an order pursuant to CPLR 6223 to vacate the order of attachment entered on behalf of Banco-Brasileiro on grounds that no cause of action for fraud or deceit exists in this State; (2) for an order pursuant to CPLR 3211(A) 2, 7 and 8 to dismiss the complaint on grounds that this Court does not have jurisdiction over the subject matter of the instant action; (3) that the pleading is defective and fails to state a cause of action; (4) that there is no jurisdiction over the defendant's person; and (5) for a further order dismissing the action pursuant to CPLR 327 on grounds that the forum is inconvenient. In addition to the foregoing, movant seeks permission pursuant to



CPLR § 1012 and 1013 to intervene in opposition to the motion brought by Banco-Brasileiro pursuant to CPLR 3102(c) and CPLR 6220 requiring Bankers Trust (hereinafter referred to as Bankers) and Manfra Tordella and Brookes Inc. (hereinafter referred to as Manfra) to appear for examination and produce certain documents relating to the true identity or identities and addresses of the John Doe defendants, and the identity of the signatories to accounts maintained by the said John Does with Bankers and Manfra. In a supplemental affidavit dated September 11, 1973, plaintiff indicates its intention to extend the scope of disclosure to include matter pertaining to the existence of a possible cause of action against Bankers (CPLR 3102[c]). Bankers opposes this extension of discovery although it does not formally seek relief pursuant to CPLR 3103.

In addition to the foregoing, Banco-Brasileiro moves for an order pursuant to CPLR 3101(A) 4 and 3126 directing counsel for "John Doe No. 1" to disclose his clients' true names and addresses.

On July 26, 1973, Banco-Brasileiro obtained an order of attachment based upon a complaint seeking in its first and second causes of action rescissions of a transaction between plaintiff and the defendants John Does for alleged fraud and deceit. Such relief is predicated upon an allegation that the defendants, known only by fictitious names, had conspired to evade the Brazilian banking laws and by trick and device caused plaintiff to enter into an illegal contract to change a suitable amount of cruzeiros for over one million dollars in travelers checks. The transaction alleged is fully executed. Banco-Brasileiro has made the exchange and the defendant or defendants have since cashed said travelers checks and successfully taken a great sum of money out of Brazil in alleged contradiction of that coun-

try's banking laws. The third cause of action as pleaded in the complaint seeks compensation by way of damages for any penalty that plaintiff is forced to pay to the Brazilian government as a result of the foregoing. The complaint does not allege that any penalties have been levied or that the said Brazilian government is taking or contemplating such action.

The defendants anonymously urge upon this Court that the instant action is mere sham and device to ascertain his or their identities in order to aid a foreign criminal prosecution. While attempting to preserve anonymity, defendant John Doe No. 1 has sought and submitted himself to the jurisdiction of this Court, albeit, limited at this point.

We will, however, not permit ourselves to speculate as to a litigant's subjective intent in bringing an action so long as the matter presented to this Court presents real legal problems.

In that respect, this Court is convinced that the first and second causes of action in the complaint are cognizable in this Court as a common-law cause of action even though the parties and the subject matter of the contract was no nexus to this jurisdiction. (Hutchinson v. Ward, 192 N.Y. 375, 381; 1 Carmody-Wait, 2d N.Y. Practice § 2.90; 5 Carmody-Wait 2d N.Y. Practice § 2.90; 5 Carmody-Wait 2d supra § 29.945). Moreover, at this stage it matters not whether we would ultimately dismiss the action for forum non conveniens (CPLR 327; Glendar v. Glendar, 24 A.D. 2d 492). It may yet appear that there are practical considerations which justify the entertainment of this action by the courts of this state (Taylor v. Interstate Motor Frght. System, 309 N.Y. 633; Bata v. Bata, 304 N.Y. 51).

The court is satisfied that the complaint sets forth a cause of action for fraud and deceit. It is not necessary at



this point to involve oneself in the merits of the controversy. It is enough that a cause of action for fraud is stated (Auerbach v. Grand Nat'l Pictures Ltd., 176 Misc. 1031; aff'd 263 A.D. 712; Krellberg v. Gregory, 10 A.D.2d 824; 7A Weinstein-Korn-Miller, N.Y. Civil Practice § 6223:11).

Defendants' motion to vacate the order of attachment is therefore denied and the motion to dismiss the complaint for failure to state a cause of action is granted only with respect to the third cause of action. The failure to plead actual damages as the result of the fraud alleged is fatal to that portion of the complaint.

The further applications to dismiss the cause of action for forum non conveniens (CPLR 327) and for failure to obtain jurisdiction over the defendant's person (CPLR 3211(a)8) are denied as premature. The action has not yet been commenced by service of the summons and complaint. Failure of service would render both motions academic and the court need not reach the question if "practical considerations" exist which would require retention of jurisdiction (Taylor v. Interstate Motor Frgt. System, supra; Bata v. Bata, supra). Said motions to dismiss may be renewed if and when service of process has been effected.

Banco-Brasileiro's motion for an order permitting discovery and inspection of Bankers and Manfra is granted to the extent indicated in the original moving papers with the caveat that such discovery and inspection is not to be enlarged into a fishing expedition against Bankers. Banco-Brasileiro has not satisfied this court upon the facts presented that such an inquiry pursuant to CPLR 3102(c) is now warranted. It may however legitimately inquire from Bankers and Manfra the identity of said John Does (CPLR 3101[c]; Roland v. Deak, 10 A.D.2d 263; 3 Weinstein-Korn-Miller, supra ¶3102 and ¶3102.13).

*Memorandum Decision of Special Term*

Accordingly, Bankers and Manfra are directed to appear and submit for examination before trial by an appropriate officer, agent or employee with respect to the matter sought in the plaintiff's notice of motion. Said examination is to take place at Special Term, Part II of this court on February 4, 1974 at 10 A.M. or at such time and place as may be agreed to by the parties. Any documents or records specifically identified at such time and which are material, relevant and necessary to the prosecution of the instant action may be the subject of a later notice to produce (CPLR 3120; Rios v. Donovan, 21 A.D. 2d 409).

Banco-Brasileiro in addition to the other relief requested herein has moved for an order directing counsel to disclose his clients' true name or names. Defendants' counsel asserts that the attorney-client privilege shields such direct disclosure but permits him to intervene on behalf of Bankers and Manfra to prevent discovery of his client's identity by less direct methods. Such an argument of privilege runs contrary to the great weight of authority in this jurisdiction (People ex rel Vogelstein v. Warden of County Jail, 150 Misc. 714, 719; aff'd 272 A.D. 611). Matter of Kaplan (Blumenfeld), 8 N.Y. 2d 214, is the exception rather than the rule. (See also Tierney v. Flower, 32 A.D.2d 392, 395 and 5 Weinstein-Korn-Miller, supra ¶4503.19). Disclosure is in order. The motion to intervene is denied.

Counsel is therefore directed to serve upon plaintiff within 10 days after service of a copy of the order to be entered herein with notice of entry thereof, a list disclosing his clients' names and addresses.

Settle order.

Dated: December 31, 1973.

/s/ WAW
J.S.C.



## STAY ORDER OF JUDGE JASEN

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Chambers in the City of Buffalo on the 17th day of June A.D. 1975.

PRESENT, Hon. MATTHEW J. JASEN, Senior Associate Judge.

BANCO FRANCES e BRASILEIRO S.A.,

Plaintiff-Appellant,

-against-

JOHN DOE NO. 1, the name "John Doe No. 1" being fictitious and the true name being unknown to plaintiff, said defendant is intended to be one of the persons who participated in the fraud and deceit alleged in the complaint and who maintains an account with Bankers Trust Company, New York, New York, in the name of "Alberta,"

Defendant-Respondent,

-and-

JOHN DOE NO. 2, the name "John Doe No. 2" being fictitious and the true name being unknown to plaintiff, said defendant is

intended to be one of the persons, firms or corporations who participated in the fraud and deceit alleged in the complaint and who is also known as "Samso", and JOHN DOES NOS. 3 THROUGH 20, the names "John Does Nos. 3 through 20" being fictitious and the true names being unknown to plaintiff, said defendants are intended to be the persons, firms and corporation in addition to "John Doe No. 1" and "John Doe No. 2" who participated in the fraud and deceit alleged in the complaint,

Defendants.

MARTIN E. SILFEN, ESQ.,

Respondent.

New York County
Index No.
12017/1973

A motion for a stay in the above cause having heretofore been made upon the part of the defendant-respondent and respondent herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same is hereby granted upon condition that the petition by defendant-respondent and respondent for a writ of certiorari to the Supreme Court of the United States is filed in that Court on or before July 16, 1975, in which event the mandate of this Court



entered May 8, 1975 be and the same is hereby stayed pending the hearing and determination of the petition and if the petition is granted, the hearing and determination of the appeal by that Court, and it is further

ORDERED, that nothing herein contained shall in any way affect the order of attachment presently existing in connection with this action nor shall any action be taken therewith during the course of this stay.

Let service of a copy of this order be made on DAVIS, POLK & WARDWELL on or before June 27, 1975 and the original order be filed with proof of service, immediately after service, in the office of the clerk of the Court at Albany by certified mail, return receipt requested.

s/ Matthew J. Jasen
Senior Associate Judge

Supreme Court, U. S.
FILED
AUG 11 1975
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1975**

**No. 75-98**

JOHN DOE NO. 1,

*Petitioner,*

v.

BANCO FRANCÊS e BRASILEIRO S.A.,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

DONALD N. DIRKS
*Attorney for Respondent*
1 Chase Manhattan Plaza
New York, New York 10005
212-HA 2-3400

PHILIP C. POTTER, JR.
DONALD N. DIRKS
MARK L. AUSTRIAN
*Of Counsel*

# INDEX


| | PAGE |
|---|---|
| Questions Presented | 1 |
| Statement of the Case | 2 |
| Reasons for Denying the Writ | 5 |
| 1. The Court Should Not Exercise Certiorari Jurisdiction Where No Federal Question Was Raised or Passed Upon in Any State Court Below | 5 |
| 2. This Court Does Not Have Certiorari Jurisdiction Where None of the Matters Specified in 28 U.S.C. § 1257(3) is Drawn in Question | 6 |
| Conclusion | 9 |


## Table of Cases


| | |
|---|---|
| *Cardinale* v. *Louisiana*, 394 U.S. 437 | 6 |
| *CIO* v. *McAdory*, 325 U.S. 472 | 6 |
| *Hill* v. *California*, 401 U.S. 797 | 6 |
| *Holman* v. *Johnson*, 98 E.R. 1120 (1775) | 8 |
| *Holzer* v. *Deutsche Reichsbahn-Gesellschaft*, 277 N.Y. 478 (1938) | 8 |
| *Industrial Export & Import Corp.* v. *Hongkong & Shanghai Banking Corp.*, 302 N.Y. 342 (1951) | 8 |
| *Intercontinental Hotels Corp.* v. *Golden*, 15 N.Y.2d 9 (1964) | 8 |
| *Loucks* v. *Standard Oil Co.*, 224 N.Y. 111 (1918) | 8 |

PAGE

*McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430 ..... 6

*New York ex rel. Cohn* v. *Graves*, 300 U.S. 308 ..... 6

*Perutz* v. *Bohemian Discount Bank in Liquidation*, 304 N.Y. 533 (1953) ..... 8

*Radio Station WOW* v. *Johnson*, 326 U.S. 120 ..... 6

*Tacon* v. *Arizona*, 410 U.S. 351 ..... 6

*Wheeldin* v. *Wheeler*, 373 U.S. 647 ..... 7

*Wilson* v. *Cook*, 327 U.S. 474 ..... 6

UNITED STATES CONSTITUTION

Article I, Section 8, Clause 3 (Commerce Clause) .. 4, 7

Article VI, Clause 2 (Supremacy Clause) ..... 4, 7

Fourteenth Amendment (Due Process Clause) .... 4

STATUTES AND OTHER AUTHORITIES

28 U.S.C. § 1257(3) ..... 1, 6, 8

Bretton Woods Agreement Act, 22 U.S.C. § 286 .... 6, 7

International Monetary Fund, 60 Stat. 1401, T.I.A.S. 1501 (1945) ..... 6



APPENDIX

PAGE

Verified Complaint ..... 1b

Motion of Defendant John Doe No. 1 by Order to Show Cause dated July 24, 1973 in Supreme Court, New York County ..... 10b

Motion of Defendant John Doe No. 1 by Order to Show Cause dated May 21, 1975 in New York Court of Appeals ..... 17b

Excerpts from Affidavit of Martin E. Silfen, Sworn to May 21, 1975, in Support of Order to Show Cause ..... 21b

Order of New York Court of Appeals dated June 13, 1975 ..... 26b

IN THE

# Supreme Court of the United States

**October Term, 1975**

---

No. 75-98

---

JOHN DOE No. 1,

*Petitioner,*

v.

BANCO FRANCÊS e BRASILEIRO S.A.,

*Respondent.*

---

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

---

The petition does not properly present any federal question because no federal question was raised or passed upon in the New York State courts. Furthermore, there is no federal question whatsoever meeting the jurisdictional requirements of 28 U.S.C. § 1257(3), much less a substantial federal question meeting the test of Rule 19, involved in this case.

### Questions Presented

1. Should this Court take certiorari jurisdiction where no federal question was raised or passed upon in the New York State courts?

2. Does this Court have certiorari jurisdiction where none of the matters specified in 28 U.S.C. § 1257(3) is drawn in question?

## Statement of the Case

This is a case involving the right of a private Brazilian bank, Banco Francēs e Brasileiro S.A. ("Banco-Brasileiro"), to maintain an action in a New York court against private parties who defrauded and deceived it. Thus, the question decided by the New York Court of Appeals as set forth in its opinion is as follows (2a*):

> "The principle question before us is whether a private foreign bank may avail itself of the New York courts in an action for damages for tortious fraud and deceit and for rescission of currency exchange contracts arising from alleged violations of foreign currency exchange regulations."

The New York Court of Appeals applied state law and held that the action could properly be maintained there.

The facts may be summarized as follows: Banco-Brasileiro brought an action in the Supreme Court of the State of New York, County of New York for fraud and deceit, and conspiracy to defraud and deceive, against twenty "John Doe" defendants whose identities were and are unknown to it.** The gravamen of the complaint, a copy of which is printed in the appendix to this brief at 1b-6b, is that these defendants over a period of approximately six weeks participated in the submission of numerous false applications for travelers checks to Banco-Brasileiro in Brazil, in violation of Brazilian currency regulations which strictly limit the amount of Brazilian cruzeiros that may be exchanged into other currencies for trips outside of

---

* Such references are to pages of the appendix to the petition.

** Petitioner incorrectly states (pet., p. 5) that Banco-Brasileiro alleges that petitioner is a Brazilian citizen. There is nothing in the record to support such a statement. Banco-Brasileiro does not know the identities of the defendants (2a, 2b), who may include New York citizens or residents.



Brazil. This resulted in the improper exchange by the bank of Brazilian cruzeiros into travelers checks in United States dollars totalling $1,024,000.

On the first and second causes of action Banco-Brasileiro seeks rescission and delivery by defendants to Banco-Brasileiro of United States dollars in the amount of the travelers checks in question for exchange back into Brazilian cruzeiros, and on the third cause of action Banco-Brasileiro seeks damages of $100,000 (6b).

A large amount of the fraudulently obtained travelers checks were deposited by defendant John Doe No. 1 in an account having a code name of "Alberta" at Bankers Trust Company in New York City (2a, 2b). Other such travelers checks were deposited by defendant John Doe No. 2 in an account having the code name of "Samso" at Manfra Tordella & Brookes, Inc. in New York City (2a, 2b).

Petitioner moved in the Supreme Court, New York County (i) to vacate an order of attachment which Banco-Brasileiro had obtained against the property of John Doe No. 1 and John Doe No. 2, (ii) to dismiss the complaint or to stay the action, (iii) to intervene in a pending motion of Banco-Brasileiro seeking disclosure from Bankers Trust Company of the identity of John Doe No. 1 and other information in aid of the action and the order of attachment, and (iv) to deny Banco-Brasileiro disclosure from Bankers Trust Company. No federal question was presented in that motion, a copy of which is printed in the appendix to this brief at 10b-16b. No other substantive motion was made by petitioner in the lower court.

Surprisingly, in this certiorari proceeding purportedly seeking discretionary review of "federal questions", petitioner has not seen fit to apprise the Court of the following:

1. No federal question was raised by petitioner in any of the three levels of New York courts.

2. After the New York Court of Appeals rendered its decision and issued its remittitur (19a-21a) to the lower court for proceedings in accordance with its opinion, petitioner moved in the Court of Appeals for a stay and for an order "recalling and amending the remittitur" so that it would recite federal constitutional questions which petitioner asserted in his motion had been "presented and necessarily passed upon" by that court. Indeed, in that motion, a copy of which is printed in the appendix hereto at 17b-20b, petitioner said he wanted the remittitur amended so as to allow him to "petition the United States Supreme Court for a writ of certiorari" (18b).

3. In his moving papers in the Court of Appeals John Doe No. 1 could not show that he had raised any federal constitutional questions (see affidavit of the attorney for John Doe No. 1, sworn to May 21, 1975, the relevant excerpts from which are printed in the appendix to this brief at 21b-25b). The most that the attorney for John Doe No. 1 could say was that the record had "*brought into play* two areas of constitutional law" (22b, italics added), namely, the Commerce Clause (Article I, Section 8, Clause 3 of the United States Constitution) and the Due Process Clause of the Fourteenth Amendment to the United States Constitution (22b-25b).*

4. By order dated June 13, 1975, a copy of which is set forth in the appendix hereto at 26b-27b, the Court of Appeals denied the motion to amend the remittitur.

Thus, the Court of Appeals refused to concede that any federal question had been "brought into play" or passed upon.

---

* The petition now omits any reference to the Due Process Clause but refers to the Commerce Clause and adds the Supremacy Clause (Article VI, Clause 2 of the United States Constitution). See discussion below, at pp. 6-8.



## Reasons for Denying the Writ

### 1. The Court Should Not Exercise Certiorari Jurisdiction Where No Federal Question Was Raised or Passed Upon in Any State Court Below

The petition fails to comply with subparagraph 1(f) of Rule 23 which requires a detailed showing that any federal question was timely and properly raised so as to give the Court certiorari jurisdiction. In the words of that Rule,

> —the petition does not "specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised";
>
> —it does not set forth "the method of raising them"; and
>
> —it does not include "such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears . . . as will show that the federal question was timely and properly raised".

The reason for these omissions in the petition is, as noted above, pp. 3-4, that no federal question was ever raised in the New York courts in the case.

Subparagraph 1(f) of Rule 23 also requires a petition for certiorari to state the way the federal questions were passed upon by the state court. This requirement is also not met, again for the simple reason that no federal question was passed upon.

Petitioner tries to give the impression that federal questions were passed upon by quoting (pet., pp. 6-7) from the opinion of the *dissenting* Judge of the Court of Appeals and then concluding (p. 8):

> "Thus, the federal constitutional question of the possible conflict with or pre-emption by the Commerce Clause, the power to make foreign policy and the Bretton Woods Agreement Act was considered and rejected by the highest New York State court."

In fact, there was no discussion by the majority of the Court of Appeals or the dissenting Judge of any such possible conflict or pre-emption. The majority relied upon the Bretton Woods Agreement Act, 22 U.S.C. § 286 et seq., which authorized membership in the International Monetary Fund, 60 Stat. 1401, T.I.A.S. 1501 (1945), as a basis for its conclusion that allowing Banco-Brasileiro to maintain the action did not offend New York's public policy (6a-7a). The dissenting Judge felt that the majority was changing prior state law and expressed his view that change would "better come at the hands of the State Department and the Congress", and that a "fitting sense of judicial restraint would dictate that the courts of no single state should enunciate a change" (16a).

No federal question having been raised or passed upon in the state courts, this Court should not take certiorari jurisdiction. *Tacon* v. *Arizona,* 410 U.S. 351; *Hill* v. *California,* 401 U.S. 797; *Cardinale* v. *Louisiana,* 394 U.S. 437; *Wilson* v. *Cook,* 327 U.S. 474; *Radio Station WOW* v. *Johnson,* 326 U.S. 120; *CIO* v. *McAdory,* 325 U.S. 472; *McGoldrick* v. *Compagnie Generale Transatlantique,* 309 U.S. 430; *New York ex rel. Cohn* v. *Graves,* 300 U.S. 308.

**2. This Court Does Not Have Certiorari Jurisdiction Where None of the Matters Specified in 28 U.S.C. § 1257(3) is Drawn in Question**

The petition attempts to manufacture federal questions where none exist. Petitioner claims that the Court of Appeals' decision conflicts with two clauses of the United



States Constitution, the Commerce Clause (Article 1, Section 8, Clause 3) and the Supremacy Clause (Article VI, Clause 2), in three respects.

First, petitioner asserts that the decision conflicts with or is pre-empted by the Bretton Woods Agreement Act, 22 U.S.C. § 286 et seq. (pet., pp. 2, 9-15). The Act provides for the establishment and regulation of the International Monetary Fund and governs certain relationships among its governmental members, but it does not purport to regulate transactions between private parties such as those found in the instant case. It neither requires an American court to provide a forum for a private tort remedy nor prohibits an American court from doing so. However, as the Court of Appeals observed, the national policy of economic cooperation with the Bretton Woods signatories is furthered by providing a state forum for suit for private parties (7a). Thus, the decision of the Court of Appeals is not pre-empted by, or in conflict with, the Bretton Woods Agreement Act.

As the basis for his second "federal question", petitioner cites the power of Congress to regulate foreign commerce and the power of the President to regulate foreign affairs (pet., pp. 2, 17-18). This basis, too, is unavailing in view of the absence of a showing that any such power to regulate has been exercised in a manner that would prohibit the New York courts from allowing this case to proceed or that the Court of Appeals' decision frustrates any established federal policy.

Similarly, petitioner's reference to a "federal common law rule" (pet., pp. 2, 15-17) as his third basis for a "federal question" has no merit. As the Court stated in *Wheeldin* v. *Wheeler,* 373 U.S. 647, 651:

> ". . . As respects the creation by the federal courts of common-law rights, it is perhaps needless to state that we are not in the free-wheeling days antedating *Erie R. Co.* v. *Tompkins*, 304 U.S. 64. The instances where we have created federal common law are few and restricted."

Petitioner cites cases where courts have held that no country ever takes notice of the revenue laws of another, *e.g., Holman* v. *Johnson*, 98 E.R. 1120 (1775) (pet., p. 15). Each of these cases recited the rule where an arm or instrumentality of the state was involved, a fact not present here, as the Court of Appeals emphasized (2a, 6a, 7a). None of the cases discussed any federal common law rule which would prohibit New York State courts from assuming jurisdiction over a private dispute involving foreign currency regulations.

The prohibition against the enforcement of another state's foreign currency regulations is a rule of the forum, here the New York State courts. The New York courts have not applied this rule where *private* parties as opposed to governmental entities are involved (7a). *Intercontinental Hotels Corp.* v. *Golden*, 15 N.Y.2d 9 (1964); *Perutz* v. *Bohemian Discount Bank in Liquidation*, 304 N.Y. 533 (1953); *Industrial Export & Import Corp.* v. *Hongkong & Shanghai Banking Corp.*, 302 N.Y. 342 (1951); *Holzer* v. *Deutsche Reichsbahn-Gesellschaft*, 277 N.Y. 478 (1938); *Loucks* v. *Standard Oil Co.*, 224 N.Y. 111 (1918).

Since no federal question is involved in this case, this Court does not have certiorari jurisdiction under 28 U.S.C. § 1257(3).



## CONCLUSION

**The petition should be denied.**

Dated: New York, New York
August 8, 1975

Respectfully submitted,

DONALD N. DIRKS
*Attorney for Respondent*
1 Chase Manhattan Plaza
New York, New York 10005
212-HA 2-3400

PHILIP C. POTTER, JR.
DONALD N. DIRKS
MARK L. AUSTRIAN

*Of Counsel*

# APPENDIX

## Verified Complaint

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index No. 12017/73

---

BANCO FRANCÊS e BRASILEIRO S.A.,

Plaintiff,

—against—

JOHN DOE No. 1, the name "John Doe No. 1" being fictitious and the true name being unknown to plaintiff, said defendant is intended to be one of the persons who participated in the fraud and deceit alleged in the complaint and who maintains an account with Bankers Trust Company, New York, New York, in the name of "Alberta", JOHN DOE No. 2, the name "John Doe No. 2" being fictitious and the true name being unknown to plaintiff, said defendant is intended to be one of the persons, firms or corporations who participated in the fraud and deceit alleged in the complaint and who is also known as "Samso", and JOHN DOES Nos. 3 THROUGH 20, the names "John Does Nos. 3 through 20" being fictitious and the true names being unknown to plaintiff, said defendants are intended to be the persons, firms and corporations in addition to "John Doe No. 1" and "John Doe No. 2" who participated in the fraud and deceit alleged in the complaint,

Defendants.

---

Plaintiff Banco Francês e Brasileiro S.A., by its attorneys Davis Polk & Wardwell, for its complaint herein alleges on information and belief:

FIRST CAUSE OF ACTION

1. Plaintiff is a corporation organized and existing under the laws of Brazil engaged in the business of banking with its principal offices located at Rua 15 de Novembro, No. 268, São Paulo, Brazil.

2. Defendant "John Doe No. 1" is a person. The name "John Doe No. 1" is fictitious and the true name is unknown to plaintiff. Said defendant is intended to be one of the persons who participated in the fraud and deceit which are the subject of the complaint herein and who maintains an account with Bankers Trust Company, New York, New York in the name of "Alberta".

3. Defendant "John Doe No. 2" is a person, firm or corporation. The name "John Doe No. 2" is fictitious and the true name is unknown to plaintiff. Said defendant is intended to be one of the persons, firms or corporations who participated in the fraud and deceit which are the subject of the complaint herein and who is also known as "Samso".

4. Defendants "John Does Nos. 3 through 20" are persons, firms or corporations. The names "John Does Nos. 3 through 20" are fictitious and the true names are unknown to plaintiff. Said defendants are the persons, firms and corporations in addition to defendants "John Doe No. 1" and "John Doe No. 2" who participated in the fraud and deceit which are the subject of the action herein.

5. Pursuant to laws and decrees of Brazil, the Central Bank of Brazil has promulgated regulations relating to currency exchange control. Under such regulations a Brazilian citizen making a trip out of Brazil is strictly limited





to exchange Brazilian cruzeiros for United States dollars (or other foreign currencies) up to a maximum of U.S. $1,000.00 (or the equivalent in other foreign currencies) for the trip. The exchange of Brazilian cruzeiros for more than U.S. $1,000.00 (or the equivalent in other foreign currencies) for the trip constitutes a serious violation of the applicable regulations of the Central Bank of Brazil and laws and decrees of Brazil.

6. Plaintiff is duly authorized by the Central Bank of Brazil to conduct currency exchange operations for travelers of Brazilian citizenship, in accordance with the applicable regulations of the Central Bank of Brazil and laws and decrees of Brazil.

7. During the period from May, 1973 through June 14, 1973 plaintiff, among other transactions, exchanged Brazilian cruzeiros for travelers checks drawn on First National City Bank, New York, and Bank of America, San Francisco, upon applications purporting to be from 1,024 different Brazilian citizens in the total amount of U.S. $1,024,000.00 and submitted on their behalf by a person calling himself "Mr. Marcos". Schedules of such travelers checks drawn on First National City Bank, New York, and on Bank of America, San Francisco, are annexed hereto as "Exhibit 1" and "Exhibit 2", respectively.

8. The required application forms purporting to be from 1,024 different Brazilian citizens were completed in each case and submitted to plaintiff, including the applicant's name, address, passport number, identity card number, exit visa number and signature.

9. Said applications were false in one or both of the following respects:

(a) the purported addresses do not exist;

(b) the passport or identity card numbers as registered with the Brazilian Government are not the numbers of the individuals named in the applications.

10. Said applications were made to plaintiff by defendants "John Doe No. 1", "John Doe No. 2" and "John Does Nos. 3 through 20", through their agent who called himself "Mr. Marcos" acting for and on behalf of defendants, and said applications were known by defendants and their agent to be false when made and defendants knew at the time that said applications were made to plaintiff that plaintiff would rely upon the statements and representations therein contained.

11. Plaintiff relied upon the statements and representations contained in said applications, and believed the same to be true, and was thereby induced to exchange Brazilian cruzeiros for travelers checks in the amount of U.S. $1,000.00 drawn on First National City Bank, New York, or Bank of America, San Francisco for each application, or a total amount of U.S. $1,024,000.00.

12. Defendants thereby violated the applicable regulations of the Central Bank of Brazil and laws and decrees of Brazil relating to currency exchange control, and obtained said travelers checks through fraud and deceit.

13. Plaintiff elects to rescind each said exchange of Brazilian cruzeiros for travelers checks by reason of defendants' fraud and deceit as hereinbefore alleged.



14. Plaintiff has no adequate remedy at law.

SECOND CAUSE OF ACTION

15. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 12 of the complaint herein.

16. Defendants "John Doe No. 1", "John Doe No. 2" and "John Does Nos. 3 through 20", combined and conspired to violate the applicable regulations of the Central Bank of Brazil and laws and decrees of Brazil relating to currency exchange control, and to defraud and deceive plaintiff, and in pursuance of such combination and conspiracy, committed acts as hereinbefore alleged in violation of said regulations and laws and decrees of Brazil.

17. Plaintiff elects to rescind each said exchange of Brazilian cruzeiros for travelers checks by reason of defendants' unlawful combination and conspiracy to defraud and deceive as hereinbefore alleged.

18. Plaintiff has no adequate remedy at law.

THIRD CAUSE OF ACTION

19. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 12 and 16 of the complaint herein.

20. By reason of said travelers checks having been issued through the fraud and deceit, and the unlawful combination and conspiracy, of defendants in violation of the applicable regulations of the Central Bank of Brazil

and the laws and decrees of Brazil relating to currency exchange control as hereinbefore alleged, plaintiff will be subject to sanctions and penalties imposed by the Central Bank of Brazil in that United States dollars in the form of travelers checks were illegally taken out of Brazil, and plaintiff has suffered injury to its business and reputation, all to plaintiff's damage in a sum not less than $100,000.00.

WHEREFORE, plaintiff demands judgment:

1. On the first cause of action, declaring each said exchange of travelers checks to defendants rescinded and directing each defendant to deliver to plaintiff for exchange into Brazilian cruzeiros an amount in United States dollars equal to the face amount of travelers checks he received through fraud and deceit;

2. On the second cause of action, declaring each said exchange of travelers checks rescinded and directing defendants, jointly and severally, to deliver U.S. $1,024,000.00 to plaintiff for exchange into Brazilian cruzeiros;

3. On the third cause of action, that plaintiff have judgment against defendants in the sum of $100,000.00; and

4. That plaintiff have such other and further relief as to the Court seems just;

together with the costs and disbursements of this action.

DAVIS POLK & WARDWELL
Attorneys for Plaintiff
1 Chase Manhattan Plaza
New York, New York 10005
Telephone: HA 2-3400



FIRST NATIONAL CITY BANK NEW YORK

TRAVELERS CHEQUES USDLRS 500,—

No. 060-772-136 to 145
060-772-156 to 205
060-772-207 to 214
060-772-216 to 235
060-772-481 to 600
060-772-611 to 754
060-772-756 to 835
060-772-841 to 854
060-772-855 to 882
060-772-891 to 900
060-772-941 to 980
060-772-981 to 060-773-000
060-773-001 to 018
060-773-023 to 024
060-773-027 to 030
060-773-033 to 036
060-773-045 to 048
060-773-057 to 060

TOTAL USDOLLARS 290.000

TRAVELERS CHEQUES USDOLLARS 100,—

No. 421-229-501 to 421-230-000
421-230-001 to 120
421-230-201 to 270
421-250-001 to 360
421-250-401 to 570
421-250-601 to 770
421-250-801 to 960
421-250-071 to 421-251-000
421-251-001 to 010
421-251-101 to 400
421-251-431 to 450
421-251-461 to 421-252-000
421-252-001 to 020
421-252-031 to 060
421-252-071 to 090
421-252-101 to 130
421-252-141 to 150

*Exhibit 1*

421-252-161 to 230
421-252-711 to 720
421-252-231 to 500 TOTAL USDOLLARS 291.000

TRAVELERS CHEQUES USDOLLARS 1.000,—
No. 040-252-291 to 340 TOTAL USDOLLARS 50.000

---

BANK OF AMERICA—SAN FRANCISCO

TRAVELERS CHEQUES USDLRS 100,—
No. 824-595-990/999
824-596-000/289
824-596-330/579
824-596-610/909
824-671-060/069
824-677-595/894
824-678-015/164
824-678-135/234
824-678-290/479
824-678-485/824-679-004
824-679-005/084
824-679-565/824-680-004
824-680-005/164
824-680-240/369
824-680-380/539
824-680-620/919
824-680-940/979
824-680-990/999
824-681-000/089
825-573-730/929
825-574-060/109
825-574-615/624
825-574-675/744
825-574-755/764
825-574-805/814
825-574-835/864
825-574-945/954
825-574-965/994
825-575-005/024
825-575-995/004 TOTAL USDOLLARS 393.000

*Exhibit 2*



STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

DONALD N. DIRKS, being duly sworn, says that he is an attorney-at-law and associated with the firm of Davis Polk & Wardwell, attorneys for the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to his knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

The reason why this verification is made by deponent and not by the plaintiff is because the plaintiff is a foreign corporation.

The sources of deponent's information and the grounds of his belief are the reports and statements made by officers of the plaintiff.

/s/ DONALD N. DIRKS
Donald N. Dirks

(Sworn to before Allan J. Mayer on July 12, 1973.)

## Motion of Defendant John Doe No. 1 by Order to Show Cause dated July 24, 1973 in Supreme Court, New York County

At a Special Term, Part II, of the Supreme Court of the State of New York, held in and for the County of New York, on the 24th day of July, 1973.

Present:

GEORGE POSTEL,

*Justice.*

Index # 12017/73

---

BANCO FRANCES e BRASILEIRO S.A.,

Plaintiff,

—against—

JOHN DOE No. 1, the name "John Doe No. 1" being fictitious and the true name being unknown to plaintiff, said defendant is intended to be one of the persons who participated in the fraud and deceit alleged in the complaint and who maintains an account with Bankers Trust Company, New York, New York, in the name of "Alberta", JOHN DOE No. 2, the name "John Doe No. 2" being fictitious and the true name being unknown to plaintiff, said defendant is intended to be one of the persons, firms or corporations who participated in the fraud and deceit alleged in the complaint and who is also known as "Samso", and JOHN DOES Nos. 3 through 20, the names "John Does Nos. 3 through 20" being fictitious and the true names being unknown to plaintiff, said defendants are intended to be the persons, firms or corporations in addition to "John Doe No. 1" and "John Doe No. 2" who participated in the fraud and deceit alleged in the complaint,

Defendants.

---



*Motion of Defendant John Doe No. 1 by Order to Show Cause dated July 24, 1973 in Supreme Court, New York County*

Upon reading and filing the annexed affidavit of Stephen Gillers, sworn to July 23, 1973 with exhibits thereto, and on all prior proceedings had herein, and sufficient reason appearing therefor,

LET Banco Frances e Brasileiro S.A. show cause before this Court, at Special Term Part I, at the County Courthouse, 60 Centre Street, New York, New York, on the 26th day of July, 1973, at 9:30 A.M., or as soon thereafter as counsel can be heard, why an Order should not be made and entered:

A. Pursuant to CPLR 6223; CPLR 3211(a) 2, 7 and 8, and CPLR 327,

(1) vacating the order of attachment entered July 6, 1973, a copy of which is annexed to the affidavit of Stephen Gillers as *Exhibit "B"*, on the ground that there is no cause of action to recover damages for fraud or deceit against "John Doe No. 1" in this State;

(2) dismissing plaintiff's verified complaint, a copy of which is annexed to the affidavit of Stephen Gillers as *Exhibit "A"*, on the ground that:

(a) as a matter of law:

(i) said complaint on its face fails to state a cause of action against "John Doe. No. 1";

(ii) this Court has no jurisdiction of the subject matter of the causes of action of said complaint in that the complaint seeks to enforce the internal revenue and currency laws of Brazil;

(iii) this Court has no jurisdiction of the person of "John Doe No. 1", and

(b) as a matter of discretion:

(i) this Court should not interfere with the internal affairs of a foreign country where no legitimate reason appears for using the Courts and process of the State of New York;

(ii) the processes of this Court are being abused to obtain disclosure which will demonstrate that plaintiff's action may not be maintained in this State but that such action, if maintained at all, may only be maintained in a foreign jurisdiction;

(iii) the processes of this Court are being abused in that the plaintiff is seeking information under CPLR 3102(c) under the guise of bringing a New York action, when it knew it has no action in the State of New York, and the information will be used for abusive and extortionate purposes to obtain a collateral advantage in private negotiations;

(iv) this action is a sham and a fraud on the Court;

(3) in the interest of substantial justice, fairness and convenience, requiring plaintiff to bring its action in another forum and permanently staying such action in this Court or dismissing it on the ground that:

(a) plaintiff and "John Doe No. 1" are non-residents of the State of New York;

(b) plaintiff is not licensed to do business in the State of New York;



(c) the causes of action as alleged in plaintiff's verified complaint arose without the State of New York;

(d) the internal revenue, currency or forfeiture laws of a foreign jurisdiction, alleged to have been violated by "John Doe No. 1", are the subject matter of this action;

(e) no wrongdoing in the State of New York, either civil or criminal, is alleged against "John Doe No. 1", and

(f) the State of New York has no nexus to either the parties or to the subject matter of plaintiff's action.

B. Pursuant to CPLR 1012 and CPLR 1013, permitting "John Doe No. 1" to intervene in the motion brought on by plaintiff, purportedly pursuant to CPLR 3102(c) and CPLR 6220, a copy of which is annexed to the affidavit of Stephen Gillers as *Exhibit "C"*, and permission having been granted, why an order should not be entered pursuant to CPLR 3103, and why this Court should not exercise its discretion under CPLR 3102(c) by granting an order:

(1) on its own initiative and, as a matter of right or by the exercise of discretion, denying or regulating the disclosure sought by plaintiff against Bankers Trust Company so as to prevent unreasonable and irreparable damage to "John Doe 1" in the manner as hereafter set forth:

(a) holding in abeyance plaintiff's motion seeking disclosure against Bankers Trust Company until such

time as there has been a final determination of the motion of "John Doe No. 1" as set forth in Paragraphs A(1)-(3) above;

(b) denying plaintiff's motion seeking disclosure under CPLR 3102(c) on the ground that:

(i) plaintiff has already framed a verified complaint which on its face (Paragraphs 1, 2, 5, 6, 7, 8, 9, 10, 11, 12, 16 and 20) demonstrates that this Court does not have jurisdiction as a matter of law or as a matter of discretion over either "John Doe No. 1" or the subject matter of plaintiff's action, and the disclosure sought could not be used in the State of New York for any legitimate purpose but could be used extralegally against "John Doe No. 1" elsewhere;

(ii) the enabling statute [CPLR 3102(c)] does not permit disclosure in aid of an action where a complaint has already been framed and served upon a garnishee in aid of attachment;

(c) denying plaintiff's motion seeking disclosure against Bankers Trust Company under CPLR 6220 on the ground that:

(i) plaintiff has previously levied against the property of "John Doe No. 1" at Bankers Trust Company and, pursuant to CPLR 6219, Bankers Trust Company, as garnishee, served upon the Sheriff of the County of New York a statement specifying that Bankers Trust Company did not have any property in its possession or custody in which "John Doe No. 1" had an interest, thus making plaintiff's motion under CPLR





6220 unnecessary as directed against Bankers Trust Company since Bankers Trust Company has no property in which "John Doe No. 1" has an interest, and Bankers Trust Company owes no debt to "John Doe No. 1";

(ii) the enabling statute (CPLR 6220) may not be used as a device to obtain information of property of "John Doe No. 1" situated elsewhere where plaintiff already knows that Bankers Trust Company has no property of "John Doe No. 1" in its possession or custody;

(iii) the enabling statute (CPLR 6220) may not be used as a disclosure device to obtain the "identities and residences" of "John Doe No. 1" (plaintiff's order to show cause, Paragraphs A(i) and B(i); the "authorized signatories" to the accounts of "John Doe No. 1" (plaintiff's order to show cause, Paragraph A(ii); "*all* records of the accounts" of "John Doe No. 1" (plaintiff's order to show cause, Paragraph A(iii); "all documents" showing or relating *in any way* to the manner in which, and sources from whom, "John Doe No. 1" obtained any of the travelers checks (plaintiff's order to show cause, Paragraphs A(iv) and B(ii); "all documents and records" concerning Account No. 31 820 001 maintained at Bankers Trust Company (plaintiff's order to show cause, Paragraph A(v); "all documents" showing or relating *in any way* to withdrawals made from any accounts which "John Doe No. 1" had an interest, or the individuals, firms or corporations to whom such withdrawals were paid (plaintiff's order to show cause, Paragraphs A(vi) and B(ii);

*Motion of Defendant John Doe No. 1 by Order to Show Cause dated July 24, 1973 in Supreme Court, New York County*

"all documents showing or relating *in any way* to descriptions and locations of any property in which "John Doe No. 1" has an interest allowing attorneys from the offices of Davis, Polk & Wardwell, attorneys for plaintiff, to there inspect the same and to take copies or photographs of the same (plaintiff's order to show cause, Paragraphs A(vii) and B(iii);

(d) denying plaintiff's motion seeking disclosure against Bankers Trust Company on the ground that the information sought to be disclosed is of a non-statutory privileged and confidential matter with the privilege vesting in "John Doe No. 1", which privilege has not been waived;

(e) denying plaintiff's motion seeking disclosure against Bankers Trust Company on the ground that the procedure utilized by plaintiff and the purposes for which such disclosure is sought, place in jeopardy the long-standing deep-rooted policy in international banking against disclosure of alias or numbered accounts.

Sufficient cause appearing therefor, let a copy of this order, and the papers upon which said order is based, served on Davis, Polk & Wardwell, attorneys for plaintiff, at One Chase Manhattan Plaza, New York, New York, and Bankers Trust Company at 280 Park Avenue, New York, New York, on or before 5:00 P.M. on the 24th day of July, 1973, be deemed sufficient.

ENTER,

G. P.
*J. S. C.*



**Motion of Defendant John Doe No. 1 by Order to Show Cause dated May 21, 1975 in New York Court of Appeals**

COURT OF APPEALS

STATE OF NEW YORK

New York County Index # 12017/73

BANCO FRANCES e BRASILEIRO S.A.,

Plaintiff-Appellant,

—against—

JOHN DOE No. 1, the name "John Doe No. 1" being fictitious and the true name being unknown to plaintiff, said defendant is intended to be one of the persons who participated in the fraud and deceit alleged in the complaint and who maintains an account with Bankers Trust Company, New York, New York, in the name of "Alberta",

Defendant-Respondent,

—and—

JOHN DOE No. 2, the name "John Doe No. 2" being fictitious and the true name being unknown to plaintiff, said defendant is intended to be one of the persons, firms or corporations who participated in the fraud and deceit alleged in the complaint and who is also known as "Samso", and JOHN DOES Nos. 3 THROUGH 20, the names "John Does Nos. 3 through 20" being fictitious and the true names being unknown to plaintiff, said defendants are intended to be the persons, firms and corporations in addition to "John Doe No. 1" and "John Doe No. 2" who participated in the fraud and deceit alleged in the complaint,

Defendants.

MARTIN E. SILFEN, ESQ.,

Respondent.

*Motion of Defendant John Doe No. 1 by Order to Show Cause dated May 21, 1975 in New York Court of Appeals*

Upon reading the annexed affidavit of Martin E. Silfen, sworn to May 21, 1975, and exhibits thereto, the opinion of the Court of Appeals dated May 8, 1975, the remittitur of the Court of Appeals dated May 8, 1975, the order of attachment of the Supreme Court of the State of New York, County of New York, granted July 6, 1973, the complaint of Banco Frances e Brasileiro S.A. (hereafter "Banco Brasileiro"), and upon all the proceedings heretofore had herein,

Let Plaintiff-Appellant Banco Brasileiro, or its attorneys, show cause before this Court at a Motion Term thereof, to be held at the Court of Appeals Hall, Albany, New York, on the 2nd day of June, 1975, at 2:00 o'clock in the afternoon thereof, or as soon thereafter as counsel can be heard, why an order should not issue as follows:

(i) pursuant to CPLR 5519(c), staying all proceedings to enforce the order or judgment entered on the remittitur of the Court of Appeals thereby suspending the effect of the order of attachment granted July 6, 1973, and staying any proceeding to enforce the same, pending:

(a) the hearing and determination of the motion of John Doe No. 1 (hereafter "Doe") to this Court recalling and amending the remittitur heretofore filed herein with the Clerk of the County of New York on the 15th day of May, 1975 so as to recite the constitutional questions presented and necessarily passed upon by this Court in rendering its opinions, so as to allow Doe to petition the United States Supreme Court for a writ of certiorari;



*Motion of Defendant John Doe No. 1 by Order to Show Cause dated May 21, 1975 in New York Court of Appeals*

(b) the filing and disposition of Doe's petition for a writ of certiorari to the Supreme Court of the United States based on the existence of substantial federal questions;

(c) the hearing and determination of Doe's appeal to the Supreme Court of the United States;

(d) the determination by the Supreme Court of the United States in *Bert Randolph Sugar* and *Wrestling Revue, Inc.* v. *Curtis Circulation Company, et al*, Supreme Court Docket # 74-859;

(e) upon the affirmance by the *Sugar* Court, Doe's application to Special Term, New York County, or to this Court for a vacatur of the order of attachment on the ground that such order was unconstitutionally granted, i.e. CPLR 6201(8).

(ii) granting such other and different relief as may be just and proper.

SUFFICIENT CAUSE THEREFOR APPEARING, it is hereby

ORDERED that, pending the hearing and determination of this application and the entry of an order thereon, all proceedings on the opinion of this Court and on any order or judgment to be entered on the remittitur be, and the same hereby are stayed; nothing herein contained shall in any way affect the attachment presently existing in connection with this action nor shall any action be taken in connection therewith denying the course of this stay; and it is further

*Motion of Defendant John Doe No. 1 by Order to Show Cause dated May 21, 1975 in New York Court of Appeals*

ORDERED that service by hand of a copy of this order and of the supporting papers upon Davis Polk & Wardwell, as attorneys for Banco Brasileiro, and upon the attorneys for Bankers Trust Company and the Sheriff of the City of New York, on or before 2 o'clock in the afternoon of the 23rd day of May, 1975, shall be timely and sufficient, the original order to be filed, with proof of service, in the office of the Clerk of the Court at Albany by certified mail, return receipt requested.

Dated: New York, New York
May 21, 1975

SOL WACHTLER
Associate Judge of the
Court of Appeals



**Excerpts from Affidavit of Martin E. Silfen, Sworn to May 21, 1975, in Support of Order to Show Cause**

COURT OF APPEALS

STATE OF NEW YORK

New York County Index # 12017/73

BANCO FRANCES e BRASILEIRO S.A.,

Plaintiff-Appellant,

—against—

JOHN DOE No. 1, the name "John Doe No. 1" being fictitious and the true name being unknown to plaintiff, said defendant is intended to be one of the persons who participated in the fraud and deceit alleged in the complaint and who maintains an account with Bankers Trust Company, New York, New York, in the name of "Alberta",

Defendant-Respondent,

—and—

JOHN DOE No. 2, the name "John Doe No. 2" being fictitious and the true name being unknown to plaintiff, said defendant is intended to be one of the persons, firms or corporations who participated in the fraud and deceit alleged in the complaint and who is also known as "Samso", and JOHN DOES Nos. 3 THROUGH 20, the names "John Does Nos. 3 through 20" being fictitious and the true names being unknown to plaintiff, said defendants are intended to be the persons, firms and corporations in addition to "John Doe No. 1" and "John Doe No. 2" who participated in the fraud and deceit alleged in the complaint,

Defendants.

MARTIN E. SILFEN, ESQ.,

Respondent.

*Excerpts from Affidavit of Martin E. Silfen, Sworn to May 21, 1975, in Support of Order to Show Cause*

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MARTIN E. SILFEN, being duly sworn, deposes and says:

* * * * *

The Remittitur Should Be Recalled And Amended So As To Specifically Recite The Constitutional Questions Raised By Doe And Necessarily Passed Upon By This Court

7. The Record before this Court brought into play two areas of constitutional law:

A. *The Commerce Clause*

(a) In the first place, Doe's contention that the Courts of the State of New York will not enforce the internal revenue, currency, tax or forfeiture laws of a foreign jurisdiction necessarily brought into play the inter-relationship between the laws of this State as enacted by the legislature and by decisions of this Court and the Commerce Clause of the United States Constitution, i.e. Article I, Sec. 8(3). Both the majority and the dissent opinions recognized this interplay, i.e. pp. 3-6 of the majority; pp. 1-6 of the dissent.

(b) The majority is quick to point out that its opinion sweeps away all existing prior conflicting law based upon the United States membership in the International Monetary Fund and its participation in the Bretton Woods Agreements Act. The majority opinion thrusts the Courts of the State of New York into the flow of international commerce. The dissent is quick to point out that the "responsibility for any change in this area lies with our Federal Government rather than with the highest court of any single state." So says the dissent—"Change, if at all . . . would better come at the hands of the State Department and the Congress, through the negotiation of international agreement or otherwise and the discharge of the constitutional responsibility of the Federal Government 'to regulate commerce with foreign nations'."



*Excerpts from Affidavit of Martin E. Silfen, Sworn to May 21, 1975, in Support of Order to Show Cause*

(c) The effect of the majority opinion is to carve out of the area of federal pre-emption in the field of international commerce an exception which will be applicable to the State of New York only. Having pre-empted the field of international commerce, only Congress, and not the courts of any single state, can legislate a change in the existing law of the land.

(d) Doe respectfully suggests that the importance of this issue be framed by this Court by recalling and amending the remittitur to provide by way of certified question as follows: Does Article I, Sec. 8(3) of the United States Constitution preclude a state court from reversing the firmly established rule of the conflicts of law forbidding any single state from enforcing the internal revenue, currency, tax or forfeiture laws of a foreign country?

(e) Since the majority opinion clearly recognizes that its opinion reflects a new attitude not previously established, the framed question above stated should be included in the amended remittitur so that it may be reviewed by the Supreme Court of the United States.

B. *The Due Process Clause*

(a) In the second place, subsequent to obtaining the order of attachment, Banco Brasileiro, by separate appli-

cation, sought to compel Doe's attorney to disclose Doe's true identity. Special Term ordered disclosure. The Appellate Division did not reach the question. This Court in its majority opinion placed Doe between Scylla and Charybdis.

(b) While recognizing that Special Term did not abuse its discretion in ordering disclosure, the majority opinion nevertheless recognized that "in a given situation disclosure might be inappropriate because it is inconsistent with the purpose of representation." Doe's attorney has always maintained that he was engaged to defend Doe against an inappropriate disclosure. The caveat of the majority prevents Doe from obtaining legal representation and runs counter to the due process clause of the Fourteenth Amendment which ensures a civil litigant the right to counsel. In effect, the majority says that if an attorney is specifically engaged to protect a Doe identity, the attorney need not make a disclosure which would be inconsistent with the terms of his engagement. He must, however, withdraw from the case. Under these circumstances, Doe's attorney can no longer be Doe's attorney unless he is willing to disclose the very thing which Doe engaged him not to do, i.e. disclose his true identity. Doe will never be able to obtain legal representation unless he is willing to have his identity disclosed.

(c) Such being the case, the constitutional right to counsel as guaranteed by the United States Constitution is infringed. Doe respectfully suggests that the remittitur be recalled and amended and that the following framed question be certified: Does the majority opinion of this Court violate Doe's right to counsel as guaranteed by the Fourteenth Amendment of the United States Constitution?





(d) This case presents a head-on collision between states' rights and federal supremacy. Doe intends to seek review of this Court's opinion in the United States Supreme Court. A petition for a writ of certiorari will be filed with the United States Supreme Court, 28 U.S.C. 1257 (3). The time for the filing of such petition expires on August 8, 1975, 28 U.S.C. 2101 (c). In order to maintain the status quo, a stay of the order or judgment to be entered on the remittitur as amended is required pending the filing and disposition of Doe's petition.

* * * * *

WHEREFORE, it is respectfully requested that this Court grant Doe's motion for an order, pursuant to CPLR 5519(c), and granting to Doe such other and different relief as may be just and proper.

/s/ MARTIN E. SILFEN
Martin E. Silfen

(Sworn to before Michael S. Toorock on May 21, 1975.)

## Order of New York Court of Appeals dated June 13, 1975

COURT OF APPEALS

STATE OF NEW YORK

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Thirteenth day of June A. D. 1975.

Present,

HON. CHARLES D. BREITEL,

*Chief Judge, presiding.*

1 Mo. No. 509

---

Banco Frances e Brasileiro, S.A.,

Appellant,

vs.

John Doe #1, &c.,

Respondent,

and

John Doe #2, &c., et al.,

Defendants,

and

Martin E. Silfen, Esq.,

Respondent.

---

A motion for a stay and to amend the remittitur in the above cause having heretofore been made upon the part



*Order of New York Court of Appeals dated June 13, 1975*

of respondent John Doe #1 and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as a stay is sought, be and the same hereby is marked "withdrawn", and it is

ORDERED, that the said motion, insofar as amendment of the remittitur is sought, be and the same hereby is denied.

JOSEPH W. BELLACOSA,
Clerk of the Court.